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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

**MICHAEL ZELENY, an individual,**

Plaintiff,

v.

**GAVIN NEWSOM, an individual, in his  
official capacity; XAVIER BECERRA, an  
individual, in his official capacity; CITY OF  
MENLO PARK, a municipal corporation;  
and DAVE BERTINI, in his official  
capacity,**

Defendants.

Case No. 3:17-cv-07357-RS (TSH)

**DECLARATION OF JOHN W. KILLEEN  
IN SUPPORT OF MOTION FOR RELIEF  
FROM NONDISPOSITIVE PRETRIAL  
ORDER OF MAGISTRATE JUDGE  
[L.R. 72-2]**

Dept: Courtroom 3, 17th Floor  
Judge: The Honorable Richard G.  
Seeborg

Trial Date: None set  
Action Filed: 12/28/2017

1 I, John W. Killeen, declare as follows:

2 1. I am a Deputy Attorney General with the California Department of Justice and am  
3 counsel of record for Defendant California Attorney General Xavier Becerra. I have personal  
4 knowledge of the matters set forth herein, except those matters stated on information and belief,  
5 and would so testify. I make this declaration in support of the Motion for Relief From  
6 Nondispositive Order of Magistrate Judge being filed concurrently.

7 2. For the convenience of the Court and the parties, attached hereto are true and  
8 correct copies of the following docket entries in this case:

- 9 a. ECF 99 (Second Amended Complaint), attached hereto as Exhibit 1;  
10 b. ECF 100 (Answer), attached hereto as Exhibit 2;  
11 c. ECF 135 (Discovery Letter Brief), attached hereto as Exhibit 3;  
12 d. ECF 140 (Order re Discovery Dispute), attached hereto as Exhibit 4.  
13

14 I declare under penalty of perjury under the laws of the State of California and the United  
15 States of America that the foregoing is true and correct, to the best of my knowledge, and that this  
16 Declaration was executed on September 16, 2020, in Davis, California.  
17

18 /s/ John W. Killeen

19 John W. Killeen  
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# **EXHIBIT 1**

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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

MICHAEL ZELENY,  
Plaintiff,  
vs.  
GAVIN NEWSOM, *et al.*,  
Defendants.

Case No. CV 17-7357 RS

Assigned to:  
The Honorable Richard G. Seeborg

**SECOND AMENDED COMPLAINT;  
DEMAND FOR JURY TRIAL**

Date: August 8, 2018  
Time: 1:30 p.m.  
Courtroom: 3, 17th Floor

Action Filed: December 28, 2017  
Trial Date: November 18, 2019

Plaintiff Michael Zeleny ("Plaintiff" or "Zeleny") alleges for his Second Amended Complaint against Defendants Xavier Becerra, in his official capacity ("Becerra"), the City of Menlo Park (the "City"), Police Chief Dave Bertini ("Bertini"), and New Enterprise Associates ("NEA"; collectively, "Defendants"), as follows.

1           1.       This case is brought to challenge the constitutionality of California statutes  
2 restricting Plaintiff's rights to bear arms under the Second Amendment while engaging in, and as  
3 part of, entertainment events and media productions of peaceful, public speech on matters of  
4 public concern or matters of political, social, or other concerns to the community, or issues of  
5 significant importance to the public as a whole, as protected by the First Amendment. This case  
6 also challenges the application, by the City of Menlo Park (the "City"), of California statutes  
7 restricting Plaintiff's rights to bear arms under the Second Amendment while engaging in, and as  
8 part of, entertainment events and media productions of peaceful, public speech on matters of  
9 public concern or matters of political, social, or other concerns to the community, or issues of  
10 significant importance to the public as a whole, as protected by the First Amendment. Lastly,  
11 this case challenges state statutes and municipal policies that have been seized upon by the City,  
12 which has imposed unlawful, content-based prior restraints, backed by the threat of criminal  
13 prosecution, to stifle Plaintiff's Constitutionally protected speech.

14           2.       Plaintiff Michael Zeleny ("Zeleny" or "Plaintiff") has been making lawful  
15 public protests in an effort to expose grave wrongdoing by a prominent Silicon Valley executive,  
16 Min Zhu, and those individuals and entities who have willingly continued to do business with  
17 Min Zhu despite knowing about his misconduct. Min Zhu's cohorts include New Enterprise  
18 Associates, Inc. ("NEA"), present and former members of NEA's senior management, WebEx  
19 Communications, Inc. ("WebEx"), and present and former members of its senior management.  
20 The point of Zeleny's protests is to express the view that Min Zhu's wrongdoing, and the  
21 conduct of NEA and WebEx senior management in turning a blind eye to it, should disqualify  
22 them from any involvement in publicly traded companies.

23           3.       Zeleny's protests have sought to publicize allegations that Min Zhu  
24 repeatedly raped his daughter Erin Zhu when she was 14 years old. Other Silicon Valley  
25 executives and investors, including NEA, WebEx, and their senior management, became aware  
26 of Min Zhu's incestuous, pedophilic assaults, but have nevertheless continued to do business  
27 with him. Zeleny has been protesting to expose Min Zhu's despicable conduct and the  
28 corruption of Min Zhu's cohorts for condoning it.

1           4. To amplify his message, Zeleny previously conducted protests at which he  
2 lawfully carried unloaded firearms. Zeleny also used simulated, non-explicit images and videos  
3 of Min Zhu's heinous conduct. In compliance with entertainment event and film and video  
4 production exemptions to recently enacted California bans on the carrying of unloaded firearms,  
5 Zeleny has created, and intends to continue creating, multimedia video and live entertainment  
6 events to disseminate his message.

7           5. The targets of Zeleny's protests have attempted to sweep Min Zhu's  
8 misdeeds and NEA's and WebEx's knowledge of them under the rug. They have enlisted the  
9 help of local law enforcement to suppress Zeleny's speech. In 2012, they responded to Zeleny's  
10 protests by having him arrested and criminally prosecuted for supposed violations of California  
11 open and/or concealed carry laws. Zeleny was acquitted after a bench trial. Since that time, at  
12 the behest of NEA, the City has circumvented and subverted its own policies to deprive Zeleny  
13 of access to the permitting process so that he can resume his protests.

14           6. Despite having failed in the earlier prosecution, the City continues to  
15 threaten further prosecution if Zeleny resumes his protests. The City asserts that Zeleny is  
16 required to have a permit from the City for his events in order to qualify for state law exemptions  
17 to the firearm carry ban. Yet, the City refuses to grant Zeleny a permit for his entertainment  
18 events, even though he is willing to comply with lawful time, place, and manner restrictions.  
19 Indeed, the City refuses even to advise Zeleny *what the requirements are* for seeking a permit.  
20 Instead, the City has made clear that it will not grant Zeleny a permit because it considers his  
21 message offensive, and that if he continues his protests, the City will prosecute him for violating  
22 California's obscenity laws and its open and/or concealed carry statutes.

23           7. Zeleny files this action to seek a declaration that the California statutes  
24 invoked against him are unconstitutional. Zeleny also seeks a declaration that the California  
25 statutes as applied against him by the City are unconstitutional. Zeleny contends that the People  
26 of the State of California and the Menlo Park Police Department have violated and threaten  
27 further violation of Zeleny's rights under the First, Second, and Fourteenth Amendments to the  
28 United States Constitution and provisions of the California State Constitution. Furthermore,

1 Zeleny's exercise of his Constitutional rights arises in connection with a public issue or an issue  
2 of public interest. Thus, Zeleny sues under 42 U.S.C. § 1983 for violation of his civil rights.

3 8. Zeleny challenges the facial validity of California statutes restricting the  
4 public display of unloaded firearms, California Penal Code §§ 26400 and 26350. Plaintiff also  
5 challenges the interpretation of California Penal Code §§ 25510, 26400, 26405, 26350, and  
6 26375 by local authorities in the City of Menlo Park, as applied to Plaintiff under the particular  
7 circumstances of this case, and to the City's adoption and enforcement of municipal policy as  
8 content-based restrictions on his protected speech.

### 9 JURISDICTION AND VENUE

10 9. This action arises under the United States Constitution, particularly the  
11 First, Second, and Fourteenth Amendments, and the Civil Rights Act, 42 U.S.C. §§ 1983 and  
12 1988.

13 10. This Court has original jurisdiction over these federal claims pursuant to  
14 28 U.S.C. §§ 1331 and 1343.

15 11. This Court has authority to grant the requested declaratory judgment  
16 pursuant to 28 U.S.C. §§ 2201 and 2202 and Federal Rule of Civil Procedure 57.

17 12. This Court has authority to issue the requested injunctive relief pursuant to  
18 42 U.S.C. § 1983 and Federal Rule of Civil Procedure 65.

19 13. This Court has authority to award attorneys' fees and costs pursuant to 42  
20 U.S.C. § 1988.

21 14. This Court has supplemental jurisdiction over state law claims pursuant to  
22 28 U.S.C. § 1367(a), and it is authorized to award attorneys' fees and costs pursuant to Cal. Code  
23 Civ. Proc. § 1021.5.

24 15. Each of Defendant's unlawful acts alleged herein occurred in the  
25 State of California and within the Northern District of California.

26 16. Venue is proper in the United States District Court for the Northern  
27 District of California pursuant to 28 U.S.C. § 1391(b) because the events giving rise to the  
28 instant action occurred in Menlo Park, California.

## THE PARTIES

17. Zeleny is a citizen and resident of Los Angeles, California. Zeleny is an internationally renowned researcher of the history and technology of firearms, and a holder of a California Certificate of Eligibility (COE), which certifies that the California Department of Justice (DOJ) has checked its records and determined that he is not prohibited from acquiring or possessing firearms at the time the firearms eligibility criminal background check was performed. A COE is a prerequisite licensing/permit requirement for all prospective licensed firearms dealers, licensed ammunition vendors, manufacturers, certified instructors, gun show promoters, explosive permit holders, and other firearm-related employment activities, including any agent or employee of a vendor who handles, sells, or delivers firearms and ammunition. Zeleny has never been convicted of a felony or misdemeanor offense.

18. Defendant Xavier Becerra (hereinafter "Becerra") is the Attorney General of the State of California. Plaintiff is informed and believes, and on that basis alleges, that Becerra is a citizen and resident of the State of California.

19. Defendant City of Menlo Park (hereinafter "City") is a municipal corporation duly organized and existing under the laws of the State of California and located within the Northern District of California.

20. Defendant Dave Bertini (hereinafter "Bertini") is and was at all relevant times the Commander of the Menlo Park Police Department. He committed the acts complained of herein while acting in his official capacity as Police Commander. Plaintiff is informed and believes, and on that basis alleges, that Bertini is a citizen and resident of the state of California and the Northern District of California.

21. In all of their actions and omissions alleged below, the foregoing Defendants were acting under color of state law and are being sued in their official capacities pursuant to *Ex Parte Young*, 209 U.S. 123 (1908).

22. Defendant New Enterprise Associates, Inc. (hereinafter, "NEA") is a Delaware corporation with its principal place of business in Menlo Park, California. NEA bills itself as the largest and most prominent venture capital firm in the world.



23. At all relevant times alleged herein, Defendant NEA conspired with defendants City and Bertini for the purpose of violating Zeleny's constitutional rights under the First, Second, and Fourteenth Amendments to the United States Constitution.

## **FACTS**

### **Min Zhu's Heinous Conduct**

24. Min Zhu was a prominent Silicon Valley executive who worked in the high-tech industry in California from the late 1980's until May 2005. He was a founder, President, and Chief Technology Officer of WebEx, an Internet technology company that became publicly traded on NASDAQ in 2000.

25. Plaintiff is informed and believes, and on that basis alleges, that since May 2005, Min Zhu has continued to work in the high-tech industry based out of the People's Republic of China, and that Silicon Valley executives, including current and former NEA senior management, continue to fund him and collaborate with him in his ventures.

26. Plaintiff is informed and believes, and on that basis alleges, that in or about August and September of 1988, Min Zhu repeatedly raped his daughter Erin Zhu, who was 14 years old at the time. At the time, Erin Zhu had been cut off from contact with anyone outside the home. Her mother was away undergoing medical treatment in China. While Erin Zhu was isolated and helpless, Min Zhu raped her for a period of four weeks, until his wife returned to California in September of 1988.

27. Erin Zhu testified about these events under oath in 2003. Min Zhu was afforded multiple opportunities to deny her testimony, but he has never disputed it. In early 2000, Erin Zhu successfully pursued a claim against her father, Min Zhu, for childhood sexual abuse. Erin Zhu settled her claim against Min Zhu on confidential terms.

### **Zeleny Becomes Aware of Min Zhu's Conduct**

28. Zeleny became aware of Min Zhu's monstrous conduct when he developed a personal and professional relationship with Erin Zhu from the early 1990s to 2000. During the time that Erin Zhu and Zeleny were involved, romantically and in business, Erin Zhu told Zeleny about the horrific abuse she suffered at the hands of her father, Min Zhu.

29. Erin Zhu also told Zeleny about posts she had made on the Usenet newsgroup alt.sexual.abuse.recovery in 1991 and 1992. Erin Zhu's posts corroborated what she had told Zeleny. The posts can be found at: [https://groups.google.com/forum/?hl=en#!search/erin\\$20zhu\\$20sexual\\$20abuse](https://groups.google.com/forum/?hl=en#!search/erin$20zhu$20sexual$20abuse)

30. Erin Zhu also testified about these events under oath in deposition. Her deposition testimony can be found at: <https://youtu.be/QgmWMGG3qgE/>.

31. Erin Zhu requested that Zeleny help her pursue claims against her father for childhood sexual abuse. Zeleny is informed and believes, and on that basis alleges, that Min Zhu paid Erin Zhu a substantial sum of money as part of a confidential settlement to resolve her claims in April 2000.

#### **NEA's Support of Min Zhu Despite Knowledge of the Allegations of His Conduct**

32. NEA provided venture capital support to WebEx from its early stages, through and beyond its initial public offering in 2000.

33. NEA continued to do business with Min Zhu through 2005, when Zeleny began his public protests. On May 2, 2005, during a WebEx Experience conference in San Francisco, Zeleny protested against the coverup of Min Zhu's rape of his daughter. The next day, WebEx cancelled its conference. It never held another user conference.

34. According to *Breaking News*, posted on ConferencingNews.com on May 3, 2005, WebEx shut down its user conference in response to Zeleny's protest outside the Westin St. Francis in San Francisco the day before. The archived posting reporting this event can be found at <https://web.archive.org/web/20050507090846/http://www.conferencingnews.com/breakingnews/11>

35. A week later, this report was corroborated by another conference attendee, who stated "that the conference was cancelled because a protestor with guns was outside the event and was consequently arrested Monday night." The archived posting of this attendee's report can be found at <http://web.archive.org/web/20070225101509/conferblog.com/public/item/91268>.

36. On May 13, 2005, after failing to get a restraining order against future protests by Zeleny, WebEx announced Min Zhu's sudden "retirement" and his relocation to China. The archived posting of this document can be found at

<https://web.archive.org/web/20051109144958/http://www.webex.com:80/pr/pr340.html>

37. Zeleny is informed and believes, and on that basis alleges, that the management of WebEx encouraged Min Zhu to "retire" as a result of Zeleny's public disclosure of Min Zhu's heinous conduct.

38. On September 23, 2005, *Private Equity Week* announced the formation of Northern Light, a venture capital fund co-founded in China by Min Zhu, in partnership with Scott Sandell of NEA. In commenting on this announcement on the same day, *China Venture News* reported: "What's missing in the *PrivateEquityOnline* article or any NEA release is any mention of the previous controversy surrounding NEA's venture partner, Min Zhu, who joined NEA in 2004, after his forced resignation as WebEx President and Director." The archived posting of this report can be found at [https://web.archive.org/web/20110314194905/](https://web.archive.org/web/20110314194905/http://www.chinaventurenews.com/50226711/nea_invests_in_china_vc_firm_northern_light.php)

39. Following Min Zhu's departure from WebEx and his flight from the United States, Zeleny emailed various senior management of NEA to put them and NEA on direct, personal notice of Min Zhu's abuse of Erin Zhu.

40. NEA refused to disavow Min Zhu. Zeleny is informed and believes, and on that basis alleges, that NEA has continued to do business with Min Zhu, who is now ensconced in the Peoples' Republic of China. In particular, C. Richard "Dick" Kramlich, a former Chairman and Co-Founder of NEA, moved to Shanghai in January 2008 to collaborate with Min Zhu, long after Zeleny brought the facts of Min Zhu's sexual depravity to the attention of NEA. See the report published in *San Francisco Business Times* on June 29, 2008, at <https://www.bizjournals.com/sanfrancisco/stories/2008/06/30/focus1.html?page=all>. Zeleny is informed and believes, and on that basis alleges, that NEA has sought to suppress media reports concerning the causes and circumstances of Min Zhu's departure from WebEx and the United States.

1 **Zeleny's Protests Against Min Zhu and His Enablers**

2 41. Because of the foregoing, Zeleny believed that Min Zhu was categorically  
3 unfit to serve as an officer of a publicly traded company. Zeleny also believed that anyone who  
4 would do business with Min Zhu despite knowledge of Min Zhu's monstrous conduct was  
5 similarly unfit for any position involving the public trust.

6 42. Between 2005 and 2012, Zeleny conducted a series of public protests.  
7 Initially, Zeleny's protests were directed only against Min Zhu. Zeleny later broadened his  
8 protests after NEA senior management refused to acknowledge or address Erin Zhu's claims.  
9 He expanded his protests to include the officers and directors of WebEx and investors in WebEx  
10 who had knowledge of Min Zhu's conduct, yet willingly continued to do business with him,  
11 including NEA and certain of its senior management such as Scott Sandell and Dick Kramlich.  
12 Zeleny's public protests were intended to expose Min Zhu's conduct and the moral bankruptcy  
13 of Min Zhu's cohorts for condoning it.

14 43. The protests have taken the form of in-person demonstrations, musical  
15 performances, and multimedia posts on YouTube as well as Zeleny's Internet-based LiveJournal  
16 blog, at <http://larvatus.livejournal.com/tag/webex>.

17 44. Zeleny's protests were intended to be provocative. They included flyers  
18 and posters containing graphic but non-obscene images reflecting Min Zhu's conduct. They also  
19 included flyers and posters calling out specific individuals, including WebEx's Chief Executive  
20 Officer Subrah Iyar and NEA's Scott Sandell and Dick Kramlich, for being enablers of Min Zhu.  
21 To draw attention to Zeleny's message, some of Zeleny's protests involved music played on  
22 accordions, trumpets, and bagpipes, and offers of free food to sex workers, registered sex  
23 offenders, and adult industry performers.

24 45. Zeleny made video recordings of his demonstrations and posted them on  
25 the Internet. He created a website, [www.subrah.com](http://www.subrah.com), summarizing the contents of these protest  
26 activities. On the website, Zeleny states that executives who raped family members and their  
27 knowing enablers have no place in positions of public trust.

46. In a further effort to draw attention to his First Amendment protests, Zeleny eventually moved to lawfully exercising his Second Amendment rights, openly carrying and displaying unloaded weapons in compliance with state law.

47. Zeleny always notified public officials and peace officers in advance of his plans for demonstrations. He always complied with any peace officer's request to inspect his weapons. Zeleny complied with all time, place, or manner restrictions on his protests requested by the City authorities, even when he believed that such restrictions were unlawful.

48. Zeleny's exercise of his Second Amendment rights has been part and parcel of his exercise of his First Amendment right to protest against Min Zhu and Min Zhu's cohorts. By incorporating a display of unloaded weapons, Zeleny intended to dramatize his protests, attract attention to them, and amplify his message.

#### **The Attempts to Stifle Zeleny's Protests**

49. Min Zhu and his cohorts have persistently tried to stifle Zeleny's protests.

50. In 2005, WebEx unsuccessfully sued Zeleny over truthful posts he made on the Yahoo! message board pertaining to WebEx. The case was styled *WebEx Communications, Inc. v. Zeleny*, Santa Clara County Superior Court Case No. 104CV024062, later Los Angeles County Superior Court Case No. BC324927. WebEx was eventually made to pay over \$16,000 in attorney's fees and sanctions to Zeleny, first for filing in an improper venue, and subsequently after its complaint was stricken under California's anti-SLAPP (Strategic Lawsuit Against Public Participation) statute.

51. When WebEx was unsuccessful in its efforts to silence Zeleny through civil litigation, it then enlisted law enforcement to attempt to silence him on its behalf.

52. On May 2, 2005, Zeleny began a campaign of street protests against WebEx and Min Zhu at a WebEx user conference at the Westin St. Francis hotel in San Francisco. Zeleny also protested against Subrah Iyar, another co-founder of WebEx and its CEO, and against Scott Sandell, a venture capitalist with NEA who had funded WebEx.

53. Zeleny's protest was peaceful. He did not threaten anyone or brandish any weapons. He did not use abusive language. Zeleny stood peacefully in front of the hotel, in a business suit, holding a two-foot by three-foot board, and distributing flyers.

54. WebEx nevertheless called the San Francisco Police Department and had Zeleny arrested. Because the arrest was unlawful, later that same day, May 2, 2005, the San Francisco Police department released Zeleny without charges.

55. He resumed his protest the following morning, May 3, 2005. WebEx then abruptly canceled its user conference. Ten days later, Min Zhu resigned from WebEx and left the United States for China.

56. In October 2009 and September 2010, Zeleny conducted protests in front of NEA's headquarters in Menlo Park to protest its ongoing support of Min Zhu.

**NEA and the City Conspire to Derail Zeleny's Protests**

57. In the midst of Zeleny's protests, the City and NEA entered into an agreement to stifle, restrict, frustrate, interfere with and ultimately stop Zeleny's protests by any available means. The City explained in internal documents the desire to develop a "firm solution to ending his protests." The object of this conspiracy was to delay and ultimately shut down Zeleny's protests using, among other things, harassing police tactics, false criminal prosecution, baseless legal proceedings, and later a sham permitting process.

58. The reason for the conspiracy was NEA's, the City's, and Bertini's disagreement with the content of Zeleny's protected speech and his exercise of lawful Second Amendment rights. The object of the conspiracy was illegal. At no time has the City or NEA legitimately believed or expected that they could stop Zeleny's protected based on its content. Instead, they have used unlawful and fraudulent actions as a weapon to directly interfere with Zeleny's protests through delay, distraction, and interference in violation of his First, Second, and Fourteenth Amendment rights.

59. Zeleny is informed and believes that the City and NEA first entered into this conspiracy and reached a meeting of the minds in or about 2009 through a series of phone calls and in-person communications between representatives of NEA and the City police



1 department, including Sergeant Sharon Kaufman and Bertini. NEA representatives involved in  
2 reaching and implementing the agreement included NEA security head David Tesmontan and his  
3 predecessors.

4           60. On information and belief, the conspiracy has later expanded to include  
5 other individuals and other tactics, but the general object and nature of the conspiracy has  
6 remained the same. Among other communications, Zeleny is informed and believes that the  
7 City and NEA developed and fostered the conspiracy through numerous meetings and phone  
8 calls, corresponding to Zeleny's protests, including in October 2009, September 2010, October  
9 2010, April 2011, October 2011, February 2012, June 2012, March 2013, April 2013, and  
10 September 2015. In addition, NEA and the City have routinely emailed one another regarding  
11 Zeleny throughout the period of his protests.

12           61. The conspiracy between the City and NEA has continued to date. The City  
13 and NEA have remained in regular contact since forming the conspiracy to develop ways, both  
14 explicit and tacit, to perpetually stifle, delay, frustrate, and interfere with Zeleny's protected  
15 activity. According to the City, it remained in "close contact with security from NEA" to  
16 address Zeleny and has "worked collaboratively" with NEA to address Zeleny's protests.

17           62. Each of NEA and the City have taken overt acts in furtherance of the  
18 conspiracy, including, without limitation, those alleged below.

19 **Baseless Legal Proceedings Against Zeleny**

20           63. NEA and its executives and affiliates have filed a series of baseless legal  
21 proceedings against Zeleny pursuant to the conspiracy. The campaign by NEA and its affiliates  
22 began with the WebEx lawsuit in 2004. On information and belief, each of these lawsuits was  
23 brought with NEA's assistance and encouragement, pursuant to a policy of starting litigation  
24 against Zeleny without regard to its merit, solely for the purpose of interfering directly with his  
25 protests by seeking frivolous emergency relief, intimidating Zeleny, and sapping his resources.

26           64. In 2004, NEA affiliate WebEx frivolously sued Zeleny for defamation in  
27 the case styled *WebEx Communications, Inc. v. Michael Zeleny*, Santa Clara Superior Court,  
28 Case No. 1-04-CV 024062. On information and belief, NEA encouraged and assisted WebEx in

1 this suit. The lawsuit was objectively baseless and was filed for the sole purpose of using  
2 litigation to temporarily stifle Zeleny's speech.

3           65. WebEx also engaged in other bad faith conduct to protract the litigation  
4 and disadvantage Zeleny, using the litigation to sap his resources and interfere with his protests.  
5 It filed suit in the wrong venue in clear violation of California law. WebEx was made to pay  
6 \$4,316.30 in sanctions for frivolously suing in the wrong venue.

7           66. The trial court then struck the majority of WebEx's complaint under the  
8 California Anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16, finding that had no likelihood of  
9 success on the merits. As a result, WebEx was made to pay another \$12,000.00 in sanctions to  
10 Zeleny for filing frivolous claims in an effort to stifle his First Amendment rights.

11           67. WebEx dropped the remainder of its case in exchange for a waiver of  
12 malicious prosecution claims and Zeleny's agreement not to file an Anti-SLAPP motion in other  
13 contemplated litigation.

14           68. Zeleny is informed and believes that in 2009, with the encouragement and  
15 assistance of NEA and the City, NEA executive Scott Sandell filed a frivolous application in the  
16 San Mateo Superior Court for a temporary restraining order against Zeleny. This application  
17 was based on Zeleny's protests.

18           69. This application was objectively baseless and known by NEA, Sandell, and  
19 the City to be baseless. Zeleny had not engaged in any conduct offering a basis for a restraining  
20 order under California law. The TRO application was also untenable under established law as  
21 violative of Zeleny's First Amendment rights.

22           70. On information and belief, the TRO application was filed to directly  
23 interfere with Zeleny's protests despite knowledge of NEA and Sandell they could not prevail on  
24 the merits and that the TRO would be dissolved at a merits hearing.<sup>1</sup> NEA and Sandell

25  
26 <sup>1</sup> Under California procedures, a party may seek a temporary restraining order against "harassment" on an *ex*  
27 *parte* basis by simply filing a form. If the court grants the restraining order, it will then set a merits hearing to  
28 determine whether the order can continue in effect. In the interim, the TRO requires a forfeiture of all  
firearms owned by the person subject to the order.



1 intentionally used this baseless TRO filing in an effort to delay and interfere with Zeleny's  
2 protests. The TRO application was denied without opposition or notice to Zeleny.

3           71. On October 5, 2010, NEA again filed another baseless TRO application  
4 against Zeleny in the case styled *New Enterprise Associates v. Zeleny*, San Mateo County  
5 Superior Court Case No. CIV499465. Once again, NEA knew that the TRO application was  
6 objectively baseless and would not withstand a merits hearing. Nonetheless, NEA filed the  
7 baseless application solely to interfere with Zeleny's protests and to temporarily delay the  
8 protests.

9           72. The court summarily denied the TRO application.

10           73. During this litigation, NEA engaged in other sham litigation conduct  
11 designed to entangle Zeleny in frivolous and costly litigation to directly interfere with his  
12 protests, and to distract and intimidate him. Among other things, NEA withheld and refused to  
13 disclose evidence, necessitating repeated motions to compel for basic discovery and depositions.

14           74. In late 2011, after the lawsuit had been pending for more than a year,  
15 Zeleny was forced to settle as he could not bear the ongoing expenses of defending himself.

16           75. In early 2012, in response to resumed protests, with the City's active  
17 encouragement and assistance, NEA worked with the City to prepare an application for an  
18 Emergency Protective Order ("EPO") against Zeleny. This was apparently the City's idea, but  
19 the City required assistance from NEA to act as the complaining party.

20           76. The contemplated EPO was also objectively baseless. Under California  
21 law, an EPO is available at the request of law enforcement to protect against domestic violence,  
22 child abuse, abduction, or elder abuse. No grounds existed for the issuance of an EPO.  
23 Nonetheless, as with the sham TRO applications, an EPO requires a turn over of all firearms  
24 until the merits hearing. On information and belief, the purpose of preparing the EPO was to  
25 directly interfere with Zeleny's protests without any hope of securing merits relief.

26           77. As described in more detail below, rather than file the EPO application, the  
27 City, pursuant to its conspiracy with NEA, had Zeleny falsely prosecuted for carrying a  
28 concealed firearm.

1 **Harassing Police Conduct and Surveillance**

2           78. In internal writings, including in police reports and in internal memo of  
3 May 2012, the City confirmed that Zeleny was not in violation of any laws in connection with  
4 his protected protesting activity.

5           79. Nonetheless, NEA and the City continued to harass Zeleny pursuant to the  
6 conspiracy in order to dissuade him from protesting and to disrupt his protests. None of this  
7 conduct was intended as legitimate law-enforcement activity, designed to result in arrest or  
8 prosecution. All of it was designed to directly interfere with the protests and to dissuade Zeleny  
9 from protesting.

10           80. Pursuant to the conspiracy, NEA took it upon itself—with encouragement  
11 from the City—to engage in daily surveillance of Zeleny including in-person and online  
12 monitoring. On information and belief, this surveillance was designed, in large part, as an effort  
13 to harass and intimidate. NEA's private contractors followed Zeleny and tracked his  
14 whereabouts and online activity at all times for a period of years.

15           81. NEA, with the encouragement of the City, also retained armed security  
16 staff when Zeleny was expected. The City encouraged NEA to have armed security personnel  
17 remain on location through the duration of Zeleny's protests.

18           82. As part of the conspiracy with the City, NEA would report Zeleny to the  
19 police each time Zeleny appeared, regardless of whether Zeleny had engaged in any wrongdoing  
20 and although NEA knew that Zeleny had not committed any crimes. City police gave NEA  
21 representatives their personal cell phone numbers so that NEA could contact them to address the  
22 Zeleny situation without using official channels.

23           83. NEA had no expectation that calling the police on Zeleny would result in a  
24 lawful arrest or prosecution and well knew that he had not committed any crimes. Internal  
25 police records show that Zeleny was not engaged in any criminal activity and was extremely  
26 cooperative at all times. NEA reported Zeleny solely to trigger a response by police officers  
27 who would then harass and disrupt Zeleny's protests.

28

1           84. Much of NEA's reporting to the police was false or, at minimum, highly  
2 misleading. For example, despite Zeleny not being at NEA's headquarters in close to a year,  
3 NEA security reported to the City police (as well as the FBI, ATF, and the U.S. DOJ) that  
4 Zeleny was an "on-going threat to NEA and its employees." On information and belief, NEA  
5 made other false and misleading reports to law enforcement authorities, solely for the purpose of  
6 causing them to harass Zeleny and not to secure any genuine law enforcement action such as  
7 arrest or prosecution. NEA's reporting was routinely based solely on the content of Zeleny's  
8 lawful First Amendment activity.

9           85. Consistent with the conspiracy, the City engaged in extensive harassing  
10 conduct towards Zeleny in violation of its own written policies. It would uniformly respond to  
11 NEA's reports by appearing on site and harassing Zeleny and his supporters.

12           86. City police remained on scene at all times when Zeleny was present,  
13 despite repeatedly acknowledging that Zeleny was fully cooperative and had not committed any  
14 crime. While present, City police stopped and questioned Zeleny and his supports extensively  
15 without any reasonable suspicion of criminal activity.

16           87. In violation of written City policy, police questioned Zeleny and his  
17 supporters about the content of their protests and their motivations for protesting.

18           88. City police would also follow and question Zeleny's supporters extensively  
19 about their affiliations with Zeleny and their involvement in his protests. In one instance, in an  
20 effort to dissuade Zeleny's supporters, City police extensively questioned an off-duty Sheriff's  
21 Deputy attending the protests about his relationship to Zeleny and his status with the Sheriff's  
22 department where he worked. They followed and stopped other supporters merely to question  
23 them about their affiliation with Zeleny and why they were supporting him, using sham  
24 "enforcement stops" for this purpose.

25           89. Also in violation of written policy, City police followed Zeleny and his  
26 supporters in both marked and unmarked cars and using undercover officers. City police  
27 followed Zeleny even after he left the City limits and kept tabs on where he was staying.

28

90. City police interfered with Zeleny's protests, requiring him to lower the volume of musical performances and to move his signage, even when this was not required by City ordinance or policy. Doing so was also a violation of the City's written policy.

91. The City kept extensive surveillance on Zeleny, again in violation of City policy, which prohibits City staff from keeping surveillance on protestors when there is no reasonable suspicion of a crime being committed. City police were given an express directive to issue "[d]etailed reports regarding any contact with Zeleny." In addition to generating numerous "informational" reports on Zeleny, Bertini kept his own personal "Zeleny file."

92. During Zeleny's protests, Bertini unilaterally deemed Zeleny as a "security risk," and used this as a basis to ignore City policy prohibiting the above conduct.

### **Frivolous Criminal Prosecution**

93. In July 2012, pursuant to its conspiracy with NEA, the City frivolously referred Zeleny to the County of San Mateo District Attorney's Office<sup>2</sup> for a sham prosecution for carrying a "concealed" handgun. This prosecution was also objectively baseless and a sham based on misrepresentations and the suppression of exculpatory evidence required to be disclosed to Zeleny under *Brady v. Maryland*, 373 U.S. 83 (1963). The City and NEA's aim was, again, to directly interfere with Zeleny's protests rather than to achieve a legitimate outcome through the criminal process.

94. The City's referral of the criminal case was fraudulent and based on the willful withholding and misrepresentation of evidence. Initially, the officers who responded to Zeleny's protests on the date in question, June 13, 2012, found no evidence of criminal activity. Nonetheless, Bertini made the decision to refer Zeleny for prosecution.

95. The City referred Zeleny for prosecution based on the written report of Officer Jeremy Foy. Initially, Officer Foy reported his interaction with Zeleny as informational only. Neither Officer Foy, nor any of the other officers on site, arrested Zeleny, cited him, or suggested that he was committing a crime.

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<sup>2</sup> The District Attorney's Office is not a City agency, but an agency of San Mateo County.

1           96.     Later, apparently after speaking with Sharon Kaufman and Bertini  
2 (participants in the conspiracy), Officer Foy generated a felony policy report against Zeleny,  
3 which Bertini used to make the criminal referral, and which the County used to prosecute  
4 Zeleny. In this sham report, Officer Foy asserted that he had observed Zeleny carrying a  
5 “concealed” firearm in a belt holster. According to Officer Foy, the holster was such that he  
6 could not determine whether it contained a weapon. This was the entire basis for the City’s  
7 referral for prosecution and the County of San Mateo’s prosecution.

8           97.     The City and the County District Attorney’s office concealed from  
9 Zeleny—in violation of his constitutional rights under *Brady*—and from the trial court, that in a  
10 prior report Officer Foy had documented the same firearm in the same holster and reported that  
11 he was able to immediately see that the holster contained a firearm. As a result, the firearm was  
12 not “concealed.” Officer Foy made the prior report for informational purposes, concluding that  
13 no crime had been committed. On information and belief, the City and the County intentionally  
14 concealed this clearly-exculpatory evidence to support the sham prosecution.

15           98.     The fraudulent basis for the criminal prosecution, and the wrongful  
16 withholding of evidence, was such that it deprived the entire proceeding of its legitimacy.

17           99.     The City and the County engaged in further sham conduct in connection  
18 with the criminal proceeding. Among other things, the Deputy District Attorney in charge of the  
19 case claimed at different stages of the proceeding that Zeleny had violated the law by carrying a  
20 “concealed” weapon, and through the same conduct violated the law by “openly” carrying a  
21 weapon. When Zeleny argued that he fell within an exception to the firearms statutes because he  
22 was taking part in an entertainment event or video production, the City made retroactive changes  
23 to the policies posted on its website for such events, which the County prosecutor then relied  
24 upon to argue that Zeleny needed a permit for these activities so could not fall within the  
25 exception.

26           100.    On information and belief, the City and County pursued the sham  
27 prosecution at NEA’s behest and with its active encouragement and participation. Despite  
28 having no standing to participate in the criminal proceeding, NEA inserted itself into that

1 proceeding, ultimately controlling prosecutorial decisions. In the course of the prosecution,  
2 NEA's representatives monitored Zeleny's trial, gave *ex parte* strategic input to both Bertini and  
3 the District Attorney's Office, and met frequently with Deputy District Attorney. The Deputy  
4 District Attorney regularly referred to NEA as "her client" or "the client," and indicated that she  
5 needed NEA's approval before making significant decisions.

6 101. More than two years the District Attorney filed the frivolous criminal  
7 charges, the trial court acquitted Zeleny, holding: "His weapon was properly holstered in the  
8 holster which was manufactured for that very weapon." The criminal prosecution had its  
9 intended effect, however, of stopping Zeleny's protests for two years under the threat of criminal  
10 prosecution.

11 102. While the criminal prosecution was ongoing, California enacted new  
12 restrictions on the "open carry" of firearms, described below. The City immediately seized on  
13 these new laws to stop Zeleny from protesting.

14 **California Adopts "Open Carry" Restrictions for Handguns and Non-Handgun Firearms**

15 103. Prior to January 1, 2012, it was legal to openly carry an unloaded firearm  
16 in public in California. On October 10, 2011, Governor Brown signed a bill that modified the  
17 law on openly carrying an unloaded handgun to match the existing restrictions for openly  
18 carrying a loaded weapon.

19 104. California Penal Code section 26350 now prohibits the open carrying of an  
20 unloaded handgun, outside of a vehicle, in public, in an incorporated city or city and county.

21 105. Section 26375 exempts from section 26350, "the open carrying of an  
22 unloaded handgun by an authorized participant in . . . a motion picture, television or video  
23 production, or entertainment event, when the participant lawfully uses the handgun as part of  
24 that production or event."

25 106. A year later, in 2012, California adopted similar restrictions on open carry  
26 of firearms other than handguns. Penal Code section 26400, which became effective on January  
27 1, 2013, makes it a crime for a person to "carry[ ] an unloaded firearm that is not a handgun in  
28 an incorporated city or city and county when that person carries upon his or her person an



1 unloaded firearm that is not a handgun outside a vehicle while in the incorporated city or city  
2 and county.”

3 107. Section 26405(r) contains a similar exemption for “an authorized  
4 participant in, or an authorized employee or agent of a supplier of firearms for, a motion picture,  
5 television, or video production or entertainment event, when the participant lawfully uses that  
6 firearm as part of that production or event.”

7 108. Section 25510 contains a similar exemption from sanctions under Section  
8 25400 for carrying a concealed firearm for “an authorized participant in a motion picture,  
9 television, or video production, or an entertainment event, when the participant lawfully uses the  
10 firearm as part of that production or event, or while going directly to, or coming directly from,  
11 that production or event.”

12 **Zeleny’s Efforts to Engage in Protected First and Second Amendment Activity**

13 109. Since the enactment of Penal Code sections 26350 and 26400, Zeleny has  
14 attempted to continue his peaceful protests as part of a video production, exercising his rights  
15 under sections 25510, 26375, and 26405 to film his protests, and then distributing the videos  
16 online.

17 110. Zeleny’s protests are part of a rich history of peaceful, but armed, protests,  
18 many drawing inspiration from the Black Panthers. Protests of this nature are common across  
19 the country in states that have not completely banned the open carry of unloaded firearms. The  
20 conspicuous bearing of loaded and unloaded arms in connection with a public or political issue  
21 is an effective form of political speech and public demonstration.

22 111. Zeleny’s protests are protected activity under both the First and Second  
23 Amendments to the United States Constitution.

24 112. The First Amendment protects non-verbal forms of communication as well  
25 as verbal speech. Zeleny’s protests, which combine pure speech, flyers, signs, posters, video,  
26 and the peaceful carrying of unloaded firearms, are constitutionally protected activity.

27 113. Zeleny is equally entitled to the benefit of sections 25510, 26375, and  
28 26405 of the Penal Code as would be a large movie studio or production company. “Liberty of

1 the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as  
2 much as of the large metropolitan publisher who utilizes the latest photocomposition methods.”  
3 *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972). While Zeleny was not engaged in the  
4 production of feature films intended for national and international distribution, he did create his  
5 video content for the purpose of publishing it on the Internet, in connection with a matter of  
6 significant public interest.

7 114. Zeleny’s right to openly carry unloaded firearms is also protected by the  
8 Second Amendment. The right to bear arms enshrined in the Second Amendment includes the  
9 right to “wear, bear, or carry . . . upon the person or in the clothing or in a pocket for the purpose  
10 of being armed and ready . . . in case of conflict with another person.” *District of Columbia v.*  
11 *Heller*, 554 U.S. 570, 584 (2008). The motivating principle of the Second Amendment is self-  
12 defense. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

13 115. The First and Second Amendment are made applicable to municipalities  
14 pursuant to the Due Process Clause of the Fourteenth Amendment.

15 116. The Defendants, however, acting under color of law and in their official  
16 capacities, have either suppressed or threatened to suppress Plaintiff’s lawful exercise of his  
17 Constitutional rights pursuant to official policies, customs, or practices. The Defendants  
18 interpret certain California statutes in such a way that Plaintiff’s protests are completely  
19 foreclosed by California’s prohibition on the carriage of exposed firearms.

20 **The City Threatens Further Prosecution in an Effort to Chill Zeleny’s Protected Speech**

21 117. The City, invoking the power of the State of California, continues to  
22 threaten Zeleny with further prosecution if he resumes his protests. The City police have  
23 candidly confirmed that their threatened prosecution is based in part on the content of Zeleny’s  
24 message, which they find to be offensive.

25 118. On March 15, 2013, following a meeting with NEA, the City noted that  
26 open carry is “now illegal,” referring to the Penal Code sections discussed above, such that  
27 Zeleny would no longer be allowed to carry guns in his protests.



1           119. In order to ensure that Zeleny cannot rely on the express exceptions to the  
2 “open carry” ban, acting at the behest of NEA, the City has developed an artificial and defective  
3 interpretation of the statutes for the sole purpose of interfering with Zeleny’s protests.  
4 According to the City, in order to fall within the exceptions, Zeleny must have City approval  
5 through an opaque permitting process, described in more detail below, in order to carry weapons  
6 as part of his protests.

7           120. Between June 2015 and the present, Zeleny has attempted to exercise his  
8 rights under sections 25510, 26375, and 26405 by engaging in videotaped protests while  
9 carrying unloaded firearms, including handguns and rifles.

10           121. Contrary to the plain language of the Penal Code, however, the City has  
11 interpreted it to require authorization from the City both for the video production itself, and for  
12 the carrying of unloaded firearms as part of that production.

13           122. Shortly after the adoption of section 26405, the City adopted a municipal  
14 policy, which purportedly requires a Special Event Permit for Zeleny’s protests.

15           123. The City informed Zeleny that if he engages in his protests without a  
16 permit under its Special Event Permit policy and/or a film permit from the City, he will be  
17 prosecuted for violation of California’s open and/or concealed carry laws, including California  
18 Penal Code §§ 25400, 26400, and 26350.

19           124. In an effort to comply with the City’s requirements, between 2015 and  
20 present, Zeleny has repeatedly applied to the City for entertainment and/or film permits  
21 accommodating his videotaped, armed protests. Despite his offers to accommodate all  
22 reasonable time, place, and manner restrictions on his proposed events, the City has denied all of  
23 Zeleny’s applications without explanation. It has expressly declined to formulate conditions for  
24 approval or to provide Zeleny with any lawful time, place, or manner restrictions that he could  
25 satisfy in order to secure permits.

26           125. Zeleny has repeatedly requested that the City identify the conditions or  
27 criteria Zeleny must satisfy to receive a permit, and the City has failed and refused to do so.  
28

1           126.       During an appeal of one of Zeleny's requests for a permit, Bertini  
2 testified that the City had denied Zeleny's requests, among other reasons, because they found the  
3 content of his protests offensive and "obscene as to minors." Evidence uncovered in discovery  
4 demonstrates that the City has attempted (largely unsuccessfully) to use obscenity and similar  
5 content-based statutes to stop Zeleny's protests since at least 2010.

6           127.       Plaintiff is informed and believes, and on that basis alleges, that the City  
7 has continually denied and refused to process Zeleny's requests for permits because it disagrees  
8 with the substance of his message, and does not believe that his statement about Min Zhu's  
9 conduct or WebEx's and NEA's tacit approval of that conduct are true.

10           128.       The requirement that Zeleny obtain a permit, and refusal to approve  
11 Zeleny's permits or processes them in the ordinary course, is an unlawful, content-based  
12 restriction on Zeleny's speech protected by the First Amendment. Plaintiff is informed and  
13 believes, and on that basis alleges, that the content-based refusal to approve Zeleny's requests  
14 for permits was undertaken pursuant to an official policy, custom, or practice of the City.

15           129.       In August 2016, Zeleny met with Menlo Park City Manager Alex McIntyre  
16 and Police Commander David Bertini in seeking a permit. At that time, Commander Bertini  
17 took issue with a piece of non-obscene artwork that Zeleny was proposing to display as part of  
18 his protests. An accurate depiction of the artwork is attached hereto as **Exhibit A**.

19           130.       Commander Bertini threatened that if Zeleny displayed the artwork, he  
20 would be arrested for violation of California Penal Code, section 313.1(a), which prohibits the  
21 distribution of harmful content to minors. Commander Bertini also threatened Zeleny with  
22 criminal sanctions for carrying firearms in the course of his videotaped protests.

23           131.       Zeleny is informed and believes, and on that basis alleges, that the  
24 foregoing conduct of the City and City officials was pursuant to an official policy, custom, or  
25 practice of the City.

26           132.       Zeleny continues to exercise his right to free speech under the Constitution,  
27 in connection with this issue of public interest. Zeleny tried many different ways of  
28 accommodating the City and NEA, but their demands kept escalating unreasonably, from

1 objections to the volume and nature of unamplified musical performances, to demands to  
2 relocate the protests outside of the Rosewood complex that houses NEA. Ultimately, what the  
3 process revealed was content-based discrimination.

4 **The City and NEA Entangle Zeleny in a Sham Permitting Process**

5 133. Evidence uncovered during discovery demonstrates that the City and  
6 Bertini, with the assistance and encouragement of NEA, developed a strategy to apply sham  
7 permitting procedures to Zeleny's permit applications, with the specific purpose of depriving  
8 him of access to the ordinary administrative process. The purpose of this conduct was not to  
9 reach a legitimate outcome on Zeleny's permit applications, but to complicate, frustrate, and  
10 perpetually delay the process to interfere with Zeleny's ability to protest. To date, Zeleny's most  
11 recent permit application remains in limbo and the City refuses to process it even now.

12 **The Published Permitting Process**

13 134. The City publishes on its website a series of procedures governing the  
14 process for seeking Special Events Permits within the City.

15 135. The process is designed to be an interactive process between the citizen  
16 and the City to develop a permit application that will be approved by the City. As specified by  
17 published City policy, the process is supposed to involve the following steps:

18 a) The City Community Services Director communicates with the  
19 applicant to secure a permit application, and then screens the initial application for  
20 completeness. If the application is incomplete, within 48 hours, the Community Services  
21 Director will communicate with the applicant regarding any deficiencies.

22 b) The application is then forwarded to six internal City departments  
23 for a collaborative review. Bertini is not ordinarily involved in this process. Within 10 days, the  
24 internal staff review and either conditionally approve or disapprove the decision.

25 c) If internal staff need more information, the Community Services  
26 Director sets up an in-person meeting with the applicant to address this information with the  
27 goal of securing a complete application.

1 d) Once the information is provided, the City will then send  
2 Conditions of Approval or Denial to the applicant. Once these items are completed, the permit  
3 will be conditionally approved subject to public notice.

4 e) If the application is denied, it is then subject to a two-stage appeal  
5 process, first with the City Manager, and then with the City Council. At both stages of appeal,  
6 both the applicant and the City are allowed to present evidence and argument, and examine and  
7 cross-examine witnesses, all in a public hearing on the record. Final denials are subject to  
8 review in court pursuant to California Code of Civil Procedure § 1094.8.

9 136. In the ordinary course, special event permits are generally given  
10 conditional approval within a matter of days or weeks based on a very basic description of the  
11 date, time, and location of the event and the expected activities and setup.

12 137. The City has a separate permitting process for film permits. A different  
13 City department handles film permits. In practice, they are issued based on a cursory  
14 application, again with minimal information required. The City approves most film permits  
15 within a day or a few days of a request.

16 **The City and NEA Conspire to Derail Zeleny's Permit Applications**

17 138. On or about July 10, 2015, in an effort to comply with the City's  
18 interpretation of the firearms statutes, Zeleny submitted a Special Events Permit application. He  
19 stated that he planned to start on October 1, 2015. Without telling Zeleny, the City (at Bertini's  
20 direction) then circumvented the permit process entirely, and subjected Zeleny's permit to *ad*  
21 *hoc* processes that have never applied to any application before or after.

22 139. As part of the ongoing conspiracy, Bertini took action to stymie and  
23 deprive Zeleny of a valid process. Bertini intercepted and unilaterally processed and denied  
24 Zeleny's application himself on content-based grounds, without ever submitting it through the  
25 ordinary process of approval. Bertini did not allow the Community Services Director nor the  
26 six-department group to review Zeleny's permit application.<sup>3</sup>

27 <sup>3</sup> NEA was never directly involved in the permitting process. It made no appearance at any of the hearings.  
28 It did not submit any materials.

1           140. The City did not immediately respond to Zeleny and failed to respond to or  
2 process his application on its published timeline. Instead, according to internal City  
3 communications, Bertini set up a meeting with NEA “so we can coordinate our response.”

4           141. Bertini stayed in regular contact with NEA throughout the permitting  
5 process, including this in-person meeting, which took place on September 2, 2015, as well as  
6 phone calls and emails with David Tresmontan, NEA’s security officer. Throughout the process,  
7 Bertini previewed the City’s proposed course of action to NEA before any official decision.

8           142. Pursuant to this conspiracy, with NEA’s encouragement, Bertini developed  
9 a strategy to continually delay and frustrate Zeleny’s permit applications rather than allowing  
10 them to be resolved through the ordinary process. This conduct was designed not to achieve a  
11 legitimate outcome, but to use the process itself to stifle Zeleny’s ability to protest by drawing  
12 him into an endless, Kafkaesque process that did not follow established City policies or  
13 procedures. Neither the City nor NEA have a reasonable, good faith belief that the City can  
14 properly deny Zeleny’s permits on content-based grounds, and the City continues to  
15 acknowledge that it cannot legitimately stop Zeleny from protesting.

16           **Bertini Unilaterally Processes and Denies the Application, Depriving Zeleny**  
17           **of Access to the Ordinary Administrative Process.**

18           143. Rather than submit the application through the ordinary process, Bertini, in  
19 consultation with the City Attorney, unilaterally processed Zeleny’s application himself. On  
20 information and belief, this has never before occurred in the permitting program. City staff  
21 referred to Zeleny’s permit application as “the one PD [*i.e.*, the Police Department] handled[.]”

22           144. Bertini applied no objective criteria to the permit application.

23           145. The City never engaged in an interactive process with Zeleny. It never  
24 attempted to set up an in-person meeting as its policy requires to “complete” the application.

25           146. Instead, the denial of Zeleny’s application was preordained due to the  
26 ongoing conspiracy and efforts to stifle Zeleny’s protests.

27           147. On July 21, 2015, Bertini emailed NEA and others about Zeleny’s permit  
28 application. The City had not responded or provided feedback to Zeleny at that time. He

1 advised that the City had already decided to deny the application, but would still request more  
2 information from Zeleny before notifying him of the denial:

3       Although we intend to deny this application on several grounds (predominately  
4 that this is not a ‘special event’ as defined by the City), we are in the process of  
5 requesting more information from him on the exact location he was intending as it  
6 was not clear on his application. Once we have gone through the formal  
information gathering process, we will notify him of our decision on his  
application.

7 The same day, Bertini emailed NEA security officer David Tesmontan to ask if NEA was  
8 still conducting surveillance on Zeleny, apparently to obtain information to justify the  
9 pre-determined denial of the permit.

10               148. Although Bertini was effectively processing the permit application himself,  
11 the City referred Zeleny to the “Special Events Permit Committee.” In one of its denial letters,  
12 the City stated that the decision was made by this committee. ***There is no such committee and***  
13 ***never has been.*** Bertini admitted at his deposition that the City has not had a special events  
14 committee at any point since the program has been in effect.

15               **The City Frustrates Zeleny’s Application with Needless Demands for**  
16 **Information Having Already Decided to Deny the Permit.**

17               149. Consistent with this plan, although the City had already decided to deny  
18 Zeleny’s application, it continued to pepper Zeleny with requests for more information, to  
19 “complete” the application. Bertini confirmed that the City had firmly decided to deny the  
20 application, but would not notify Zeleny until “after completing the appropriate due diligence” –  
21 *i.e.*, requesting extensive, unnecessary information.

22               150. On July 24, 2015, the City Attorney emailed Zeleny demanding extensive  
23 information supposedly needed to “process” the application. The City Attorney claimed that the  
24 City could not “further process [the] application” without this information, although Bertini had  
25 already decided to deny it. He also claimed that there was no urgency to Zeleny’s application  
26 because the event was not contemplated until late September or October.

27               151. The City demanded far more extensive information from Zeleny that it has  
28 ever required from any other applicant. The City did not need this information to complete a



1 decision. Instead, on information and belief, the City simply made these demands on Zeleny to  
2 make the permitting process more difficult and to use the supposed lack of information, or an  
3 information Zeleny provided, as a pretext to deny or refuse to process the application.

4 152. The City engaged in the same conduct with respect to Zeleny's later film  
5 permit application, as discussed below.

6 **Bertini Generates Pretextual Reasons for Denying the Permit Application**

7 153. Bertini made up pretextual and circular reasons for denying the permit  
8 application, which were unsupported by City policy, when in fact the denial was purely content  
9 based. At each stage of the permitting process, the City has offered a changing series of  
10 pretextual grounds for denying Zeleny's permit application to conceal content-based restrictions.

11 154. The City has no objective criteria that it applies to permit applications  
12 either in terms of completeness or the ultimate permitting decision.

13 155. On September 21, 2015 – *i.e.*, nine days before his protest was set to start –  
14 the City sent Zeleny its official denial of his permit application. The City gave two primary  
15 reasons for the initial denial of Zeleny's permit application: (1) the application being  
16 “incomplete”; and (2) the application not meeting the criteria for a “special event.”

17 156. Both of these were pretextual. The application was not incomplete.  
18 Zeleny had provided far more information than was required to process such an application. As  
19 Bertini's communications make clear, no matter what information Zeleny submitted, his permit  
20 was going to be denied.

21 157. Similarly, the City cannot specify any objective criteria for what  
22 constitutes a “special event as defined by the City.” Instead, as Bertini has since admitted,  
23 Zeleny's activity qualifies as a special event under at least three categories in the City's  
24 published guidelines:

25 Q. Is the City -- is the definition in this FAQ of what qualifies as a special  
26 event the City's definition of a special event?

27 A. Yes.

28 Q. So under this -- at least under the published FAQ, Mr. Zeleny's event  
would qualify as a special event on at least three criteria; correct?

1 A. Yes.

2 158. After the initial denial, the City gave a series of shifting reasons for the  
3 denial. Later, the City refused to process Zeleny's application claiming that Zeleny does not  
4 need a permit to engage in protected First Amendment protests<sup>4</sup> and because "open carry" is  
5 unlawful under the new firearms statutes. These assertions were equally pretextual and circular,  
6 designed to prevent Zeleny's application from being processed.

7 159. The City has admitted that unless Zeleny has a permit, he will be arrested  
8 for carrying firearms in his protests. It has acknowledged that it knows he is seeking approval so  
9 that he can carry firearms in those protests. If Zeleny has a permit, the City acknowledges that  
10 he can carry firearms as part of the protest without facing a risk of arrest.

11 160. Bertini finally admitted at an August 11, 2016 hearing that the reasons for  
12 denial of Zeleny's permits include the content of Zeleny's protests. During that hearing, Bertini  
13 threatened Zeleny with prosecution under Penal Code § 313(1)(a), obscenity as to minors, due to  
14 the content of his proposed presentation, including the use of suggestive cartoon images. Bertini  
15 admitted that the alleged "obscenity" of Zeleny's protest was one of the grounds for denial of  
16 Zeleny's permits, although this ground has never been documented in the proceedings.

17 **Bertini Intentionally Delays Zeleny's Appeals**

18 161. Zeleny appealed the initial denial of his permit application in April 2016.  
19 The City affirmed the initial denial.

20 162. Zeleny promptly appealed in May 2016.

21 163. In June 2016, the City sent Zeleny a letter denying his appeal, reiterating  
22 Bertini's pretextual grounds. In this letter the City claimed that "[d]etermination of the approval  
23 or denial of any application is at the discretion of the Special Event Permit Committee,"  
24 although the City did not have such a committee.

25 164. Zeleny again appealed and requested a hearing before the City Manager.  
26 The hearing was eventually set for August 11, 2016. In advance of the hearing, Zeleny's

27 <sup>4</sup> The City has continued to maintain this frivolous position throughout this lawsuit as well.  
28



1 counsel asked basic procedural questions of the attorney the City had retained to oversee and  
2 conduct the hearing as well as the City Attorney. They refused to respond or explain the  
3 procedures.

4           165. At the hearing, Zeleny presented a valid, California Entertainment Firearm  
5 Permit issued by the California Department of Justice.

6           166. The City nonetheless upheld the decision on appeal in September 2016. It  
7 again asserted the same pretextual grounds and new ones, such as traffic issues and distraction  
8 of passersby. The City admitted at the hearing that it has no objective basis for establishing the  
9 grounds used to deny the permit application.

10           167. Shortly after this denial, Bertini then undertook to have Zeleny's  
11 Entertainment Firearms Permit revoked by the California Department of Justice. When the  
12 Department of Justice would not revoke the permit, the City delayed Zeleny's further appeal  
13 until the permit expired.

14           168. Zeleny timely appealed the denial to the City Council on September 16,  
15 2016. His appeal was originally scheduled for November 15, 2016.

16           169. On October 12, 2016 the City emailed Zeleny notifying him that his  
17 hearing would happen on October 26 – *i.e.*, in two weeks. Zeleny's counsel promptly notified  
18 the City that Zeleny had undergone emergency surgery, and asked to postpone to mid-  
19 November. Rather than simply revert to the original schedule, Bertini and other City staff  
20 decided not to hold a hearing until the next year, 2017.

21           170. Eventually the City unilaterally rescheduled the hearing for April 4, 2017.  
22 When Zeleny asked to advance the hearing due to his wife being due to give birth, the City  
23 refused. It eventually rescheduled the hearing for August 29, 2017.

24           171. In the interim, Bertini repeatedly contacted the California Department of  
25 Justice to seek revocation of Zeleny's firearms permit. In a June 1, 2017 email to the  
26 Department of Justice as part of these efforts, Bertini noted: "We have been postponing  
27 Zeleny's appeal." He urged the Department of Justice to revoke the permit immediately.  
28

1 172. When the Department of Justice would not do so, the City successfully  
2 postponed Zeleny's hearing until August 29, 2017, after his permit expired.

3 **The City Council Denies the Appeal Without Explanation**

4 173. The results of the August 29, 2017 appeal hearing were determined in  
5 advance. Before the hearing took place, the City had already scheduled a closed-session meeting  
6 with counsel to address potential civil litigation by Zeleny.

7 174. Bertini appeared on behalf of City staff and argued to uphold the denial.

8 175. In September 2017, the City issued its final decision, simply incorporating  
9 the prior pretextual justifications.

10 **Bertini Intercepts Zeleny's Film Permit Application and Unilaterally**  
11 **Processes that Application as Well**

12 176. On September 7, 2017, Zeleny requested that the City reconsider the denial  
13 of his permit and treat his application as one for a film permit under the separate process the City  
14 maintains for film permits. Like his special events permit application, the City did not submit  
15 his film application through the ordinary process, did not apply any objective criteria, and simply  
16 delayed and refused to process that application.

17 177. Pursuant to the City's ongoing course of conduct and its conspiracy with  
18 NEA, Bertini also intercepted Zeleny's film permit application. Bertini is not involved in the  
19 City's film permitting process. Nonetheless, after learning of Zeleny's request, Bertini  
20 immediately contacted and met with staff in the City department that processes film permits to  
21 ensure a denial of the application. On information and belief, pursuant to this meeting, Bertini  
22 dictated the film permit process as well to ensure that Zeleny would not get a permit.

23 178. On September 27, 2017, after Bertini had met with staff, the City Attorney  
24 then emailed Zeleny directing him to submit his film application to this same staff.

25 179. Once again, the City persistently delayed the application and refused to  
26 process it.

27 180. After a month of delay, City staff demanded extraordinary detail about  
28 Zeleny's proposed filming, which it did not need to process the application. They requested far

1 more detailed information than had been requested for other applications. On information and  
2 belief, City staff did this at the direction of Bertini and the City Attorney's office. Three days  
3 later, Zeleny provided the requested details.

4 181. On November 22, 2017, the City Attorney then emailed Zeleny directly,  
5 demanding even more unnecessary, extremely-detailed information about the proposed filming,  
6 including, among other things: exactly where Zeleny planned to place various items as part of  
7 his film, the names of participants and crew, the expected brightness of the display Zeleny  
8 intended to use, the types of guns, serial numbers, who will be supplying them, and other minute  
9 details.

10 182. None of this information is required in the ordinary process. On  
11 information and belief, it was demanded solely to delay the process and use Zeleny's declining  
12 to provide the unnecessary information as a basis to refuse to process his application.

13 183. Once again, the City refused to address any time, place, or manner criteria  
14 or to tell Zeleny the criteria for submitting a satisfactory application. It simply refused to  
15 process his application until he complied with the changing series of information demands.

16 184. The City also delayed the process extensively. Although most permit  
17 applications are processed within days, the City continued to dither and demand unnecessary  
18 details well into December 2017. On information and belief, the City intentionally delayed its  
19 processing of Zeleny's application in order to prevent him from protesting.

20 185. The City has continued to this day to refuse to process Zeleny's permit as  
21 "incomplete." According to the City, Zeleny's permit application still remains "pending" and  
22 cannot be processed.

23 186. Once again, at Bertini's instance, the City has taken Zeleny's film permit  
24 out of the ordinary administrative process and placed it in permanent limbo.

25 **DECLARATORY RELIEF**

26 187. An actual, substantial, justiciable, and continuing controversy exists  
27 between Plaintiff and Defendants.  
28

1           188. Plaintiff seeks to exercise his First and Second Amendment rights by  
2 engaging in peaceful protests while carrying unloaded firearms. Due to the statutes, municipal  
3 requirements, and official acts identified herein, Zeleny has been prohibited from exercising  
4 those rights, and the exercise of his First and Second Amendment rights has been chilled due to  
5 the ongoing threat of criminal prosecution.

6           189. A declaration of rights is necessary and proper to clarify Plaintiff's rights  
7 to engage in constitutionally protected activity and to govern the parties' conduct.

8           190. California Penal Code sections 26350 and 26400, on their face, prohibit  
9 Zeleny from exercising his right to carry firearms in peaceful protest. Zeleny seeks a declaration  
10 that these statutes are unconstitutional on their face, as applied to Zeleny's display of unloaded  
11 firearms as a means of protest.

12           191. California Penal Code sections 25510, 26375, and 26405 allow "authorized  
13 participants" in video productions to carry unloaded firearms in connection with such  
14 productions. On their face, these statutes permit Zeleny to carry unloaded firearms in filmed  
15 protests as part of a video production. The City has taken the position, however, that City  
16 approval is required both of the video production itself and of the "authorized participants"  
17 allowed to carry firearms.

18           192. The City has required the issuance of film permits to Zeleny as a condition  
19 of recognizing his statutory and Constitutional right to lawfully carry unloaded firearms as part  
20 of his videographed public entertainment events protesting ongoing municipal and corporate  
21 sponsorship of an incestuous child rapist. Zeleny contends that he does not need the City's  
22 permission or approval to do so, and that the City has refused its permission and approval as an  
23 unlawful content-based restraint on his right to free speech. A declaration is necessary that the  
24 City's policy requiring such approval is unconstitutional, or that the City cannot condition  
25 approval on the content of the video production or entertainment event.

26           193. The City has prohibited Zeleny from exercising his right to free speech  
27 based on the content of his protests. A declaration is necessary that Zeleny's protests and the  
28 materials used by him in those protests are not obscene as a matter of law, and do not violate

California Penal Code section 313.1(a), or in the alternative, that section 313.1(a) is unconstitutional as applied to Zeleny's protesting activities.

### **FIRST COUNT**

#### **(Violation of the First Amendment to the United States Constitution)**

#### **(Against Defendants the City of Menlo Park and Bertini)**

194. Plaintiff incorporates by reference all allegations in each of the preceding paragraphs, as if fully set forth herein.

195. The First Amendments to the United States Constitution is made applicable to the City through the Due Process Clause of the Fourteenth Amendment.

196. The City of Menlo Park and Bertini have, under threat of criminal prosecution, prohibited Zeleny from engaging in his lawful protests based on the content of his speech, claiming that they will prosecute Zeleny for obscenity as to minors.

197. Zeleny's protests are not obscene as to minors under established law.

198. The City's unwarranted threats to prosecute Zeleny for obscenity as to minors constitute an unlawful prior restraint and violate Zeleny's rights under the First Amendment.

199. Plaintiff seeks a declaration as follows:

a) That Plaintiff's conduct and materials used in his protests are not "obscene as to minors" under the California Penal Code, or generally "obscene" under applicable law.

b) That Plaintiff's protests are protected First Amendment activity.

c) That Defendants' prohibition on Plaintiff's protests violates Plaintiff's rights under the First Amendment to the United States Constitution.

### **SECOND COUNT**

#### **(Violation of the First and Fourteenth Amendments to the United States Constitution)**

#### **(Against Defendants the City of Menlo Park and Bertini)**

200. Plaintiff incorporates by reference all allegations in each of the preceding paragraphs, as if fully set forth herein.

1           201. The First Amendments to the United States Constitution is made applicable  
2 to the City through the Due Process Clause of the Fourteenth Amendment.

3           202. The City of Menlo Park has improperly interpreted the exceptions to  
4 California's firearms carry bans, California Penal Code §§ 25510, 26375, and 26405, as  
5 applicable to authorized participants in a motion picture, television or video production, or  
6 entertainment event, to require the City's approval of the production or event itself, and the use  
7 of firearms and "authorized participants" in that production or event.

8           203. The City has applied its misinterpretation of California law to give the City  
9 unfettered discretion to refuse permits for a motion picture, television or video production, or  
10 entertainment event, and participants in said production or event, including based on  
11 impermissible factors, such as the content of the production or event.

12           204. Plaintiff is informed and believes, and on that basis alleges, that the  
13 City has distinguished between commercial motion picture, television or video production, or  
14 entertainment events, and independent political productions, film and video productions of  
15 protests, and film and video productions involving matters of public concern.

16           205. As a result of the City's misinterpretation and misapplication of the  
17 California Penal Code, the City has refused to recognize the exceptions to California's firearms  
18 carry bans, California Penal Code §§ 25510, 26375, and 26405, as applicable to authorized  
19 participants in a motion picture, television or video production, or entertainment event, as  
20 applying to Zeleny.

21           206. Plaintiff seeks a declaration as follows:

22           a) That California Penal Code §§ 25510, 26375, and 26405 do not  
23 require the City's approval of the motion picture, television or video production, or  
24 entertainment event involved, or the use of firearms or the authorized participants in that  
25 production or event.

26           b) That the City's policies and practices regarding permits for motion  
27 picture, television or video production, or entertainment event are unconstitutional as applied to  
28 Zeleny.

**THIRD COUNT**

**(Violation of the First and Second Amendments to the United States Constitution)**

**(Against Defendants the City of Menlo Park and Bertini)**

207. Plaintiff incorporates by reference all allegations in each of the preceding paragraphs, as if fully set forth herein.

208. The First and Second Amendments to the United States Constitution are made applicable to the City through the Due Process Clause of the Fourteenth Amendment.

209. Menlo Park's Special Event Permit and Film Permit policies violate the First and Second Amendments to the United States Constitution, either facially, or as applied to Zeleny's peaceful protests.

210. The City has misinterpreted California Penal Code §§ 25510, 26375, and 26405 as giving the City the right, not only to approve motion picture, television or video productions, or entertainment events within City limits pursuant to customary permitting, but also to approve the individual participants in those productions or events who may lawfully use unloaded firearms. As a result, the City has asserted that it has the ability, on threat of criminal prosecution, to prohibit the lawful use of firearms in video productions as a result of non-compliance with City rules relating to motion picture, television or video production, or entertainment event permits.

211. Pursuant to its unlawful construction of §§ 25510, 26375, and 26405, the City has adopted a municipal policy that gives it unfettered discretion to prohibit protected First Amendment and Second Amendment activity, including on the grounds that the City does not approve of the content or message conveyed by that activity.

212. The City's Special Event Permit and Film Permit policies violate the First and Second Amendments of the United States Constitution on their face in that they allow the City to wholly prohibit the exercise of rights to free speech and to bear arms, or to condition the exercise of those rights on improper factors.

213. Plaintiff is informed and believes, and on that basis alleges, that the City has imposed no definite standards on its Special Event Permit and Film Permit decisions, nor



1 any limitation on the time period within which such permits must be approved, thus arrogating  
2 unbridled discretion on behalf of its permitting officials in violation of the First Amendment.

3           214. The City's Special Event Permit and Film Permit policies are void as  
4 unconstitutionally vague, in that the prohibitive terms are not clearly defined such that a person  
5 or ordinary intelligence can readily identify the applicable standard for inclusion and exclusion.  
6 The requirements impose no restrictions on the discretion of City officials to deny permits  
7 arbitrarily, capriciously, or based on unlawful factors, such as the content of protected speech.

8           215. In the alternative, the City's Special Event Permit and Film Permit policies  
9 violate the First and Second Amendments as applied to Zeleny, because the City has enforced  
10 their provisions to bar Zeleny's peaceful film and video productions and entertainment events,  
11 which comply with California state law, due to the content of his productions and events. This  
12 amounts to an unlawful, content-based prior restraint on Zeleny's protected speech activity.

13           216. The City has also applied its Special Event Permit and Film Permit  
14 requirements in such a way that it amounts to an outright prohibition against Zeleny bearing  
15 arms within City limits.

16           217. Plaintiff seeks a declaration as follows:

17           a) That Penal Code §§ 25510, 26375, and 26405 do not require the  
18 approval by a municipality in order for a person to be an "authorized participant" in a motion  
19 picture, television or video production, or entertainment event, exempted from California's  
20 prohibition on carrying unloaded firearms.

21           b) That the City's Special Event Permit and Film Permit requirements  
22 are unconstitutional under the First and Second Amendments to the United States Constitution  
23 on its face, as improper restrictions of the rights to free speech and to bear arms.

24           c) In the alternative, that the City's Special Event Permit and Film  
25 Permit requirements, as applied to bar Zeleny's peaceful entertainment events and film  
26 productions, amounts to an unlawful prior restraint on Zeleny's First Amendment right to free  
27 speech, and an unlawful restriction on his Second Amendment right to bear arms.



**FOURTH COUNT**

**(Violation of 42 U.S.C. § 1983)**

**(Against Defendants the City of Menlo Park and Bertini)**

218. Plaintiff incorporates by reference all allegations in each of the preceding paragraphs, as if fully set forth herein.

219. The City, through Bertini and other employees and agents, has violated Zeleny's constitutional rights under the First, Second, and Fourteenth Amendments to the United States Constitution, under color of state law, pursuant to official policies, customs, and practices.

220. The City has imposed unlawful prior restraints on Zeleny's protected speech activity by requiring him to unnecessarily seek permits to engage in constitutionally protected activity, and by refusing to grant any such permits based on the content of Zeleny's speech. Forbidding Plaintiff to exercise his right to free speech does not bear any relationship to protecting the public health, safety, or welfare.

221. The City and Bertini have violated Zeleny's rights to engage in protected speech by threatening him with criminal prosecution for engaging in protected activity, including threatening criminal prosecution based on the content of Zeleny's speech and his peaceful use of unloaded firearms as part of that speech.

222. The City and Bertini have violated Zeleny's right to bear arms by threatening him with criminal prosecution for exercising his Second Amendment right to peacefully bear unloaded firearms, in compliance with state law, and through enforcement of unconstitutional laws.

223. Defendants' true purpose was and is to silence the viewpoint expressed by Zeleny's speech and his mode of expression. Consequently, Defendants true purpose was and is to silence disfavored viewpoints in violation of the Free Speech Clause of the First Amendment.

224. As a direct and proximate result of Defendants' violation of the Free Speech Clause of the First Amendment and the Second Amendment, Plaintiff has suffered irreparable harm, including the loss of his constitutional rights, entitling him to declaratory and

injunctive relief, and the reasonable costs of this lawsuit, including his reasonable attorneys' fees.

**FIFTH COUNT**

**(Violation of the Fourteenth Amendment to the United States Constitution)**

**(Against Defendant Beeerra)——**

225. Plaintiff incorporates by reference all allegations in each of the preceding paragraphs, as if fully set forth herein.

226. The government bears the burden of justifying restrictions on the exercise of fundamental rights by a particular class or classes of individuals.

227. All law-abiding, competent adults are similarly situated in that they are equally entitled to exercise the constitutional right to publicly bear arms in furtherance of their right to free speech under the United States and California Constitution in connection with a public issue or an issue of public interest, whether as an authorized participant in an entertainment event or motion picture, television, or video production, or pursuant to an entertainment event permit or motion picture, television, or video production permit, or otherwise.

228. Because California's comprehensive firearms carry restrictions bar law-abiding California residents from publicly carrying a firearm in any manner in furtherance of their right to free speech under the United States and California Constitution in connection with a public issue or an issue of public interest, while allowing other law-abiding citizens to carry a firearm for motion picture, television or video productions, or entertainment events, Defendants have created a classification of persons, including Plaintiff, who are treated unequally through the denial of their First and Second Amendment rights to publicly bear arms for expressive purposes.

229. As the proximate result of the Defendants' procedures and policies, conducted under color of state law, Plaintiff has been deprived of his rights pursuant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

**SIXTH COUNT**

**(Conspiracy to Violate Civil Rights under 42 U.S.C. § 1983)**

**(Against Defendant NEA)**

230. Plaintiff repeats and re-alleges each of the foregoing allegations as though fully set forth herein.

231. Plaintiff is informed and believes, and thereon alleges, that in or about 2009, NEA entered into an agreement with the City to discourage, restrict, stifle, and ultimately halt Zeleny's exercise of his First Amendment right to protest and his Second Amendment right to bear arms. The agreement was to use whatever means were available to defer, disrupt, and interfere with Zeleny's protesting activity. These means included intimidating and harassing daily surveillance and monitoring, sham litigation, baseless, false and frivolous police reports, police harassment and intimidation, fraudulent criminal proceedings, and deprivation of Zeleny's access to the administrative permitting process, as alleged above.

232. This conspiracy was developed through a series of meetings and other communications between representatives of NEA, including its security staff, and representatives of the City, including, among others, Sharon Kauffman, and then-Commander Bertini.

233. During these meetings and communications, the City agreed to use its authority under state law to restrict, limit, and ultimately stop Zeleny's protests, and to stop him from lawfully carrying unloaded firearms within the City limits. NEA agreed, either tacitly or explicitly, to assist the City in its efforts to hamper and end Zeleny's protests and lawful carrying of firearms. Internal City documents reflect that as early as 2010, the City was devoted to developing a "firm solution" to end Zeleny's protests of NEA altogether.

234. NEA, the City, and Bertini engaged in overt acts in furtherance of the conspiracy as alleged above.

235. This conspiracy, and the acts of defendants NEA, the City, and Bertini, in furtherance of the conspiracy, injured Zeleny by preventing him from exercising his First and

1 Second Amendment rights as alleged herein, and also violated his Fourteenth Amendment  
2 rights, as alleged in more detail above.

3 **PRAYER FOR RELIEF**

4 WHEREFORE, Plaintiff sues for relief as set forth below:

5 A. Enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, binding on all  
6 Defendants, that California Penal Code §§ 26400 and 26350 are unconstitutional;

7 B. Enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, binding on all  
8 Defendants, that California Penal Code §§ 25510, 26375, and 26405 do not require municipal  
9 approval of “authorized participants” in an entertainment event or film or video production, and  
10 that Zeleny is legally permitted to carry unloaded firearms in connection with his entertainment  
11 events and/or his film or video productions, without the need for City approval, subject to  
12 compliance with other applicable laws;

13 C. Enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, binding on all  
14 Defendants, that Zeleny’s peaceful carrying of unloaded firearms in the course of his speech on  
15 matters of public concern or matters of political, social, or other concerns to the community or  
16 issues of significant importance to the public as a whole, is constitutionally protected; in the  
17 alternative, enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, binding on all  
18 Defendants, that Zeleny’s peaceful carrying of unloaded firearms in the course of his  
19 entertainment events and/or his film or video productions, is constitutionally protected;

20 D. Enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, binding on the  
21 City and Bertini, that Zeleny’s speech activity concerning the child rape cover-up by the Zhus  
22 and their associates is constitutionally protected and not obscene or “obscene as to minors”  
23 within the meaning of the California Penal Code, and that their public display would not violate  
24 Penal Code §§ 311.2, 313.1 (a), and 313.4, in virtue of its serious literary, artistic, political, and  
25 social value;

26 E. Enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, that the City  
27 of Menlo Park’s Special Event Permit requirement is unconstitutional on its face, or in the  
28 alternative, as applied to Zeleny’s protests;

F. Enter an injunction against Defendants prohibiting them from enforcing Penal Code §§ 26400 and 26350 against Zeleny in connection with his peaceful protests, from enforcing the City of Menlo Park's Special Event Permit requirement, and from refusing to grant Zeleny required permits based on the content of his speech activity;

G. Enter a declaratory judgment, pursuant to 28 U.S.C. § 2201, construing California Penal Code §§ 25510, 26405, and 26375 and enter a declaratory judgment stating that these sections exempt from sanctions under California Penal Code §§ 25400, 26400, and 26350 for the carrying of an unloaded handgun and of an unloaded firearm that is not a handgun, *any individual* who acts and/or holds himself out as an authorized participant in, or serves as an authorized employee or agent of a supplier of firearms for, a motion picture, television or video production, or entertainment event, when the participant lawfully uses that firearm as part of that production or event, as part of rehearsing or practicing for participation in that production or event, or while the participant or authorized employee or agent is at that production or event, or rehearsal or practice for that production or event. Relevant actions and representations include, without limitation, displaying ornamental signs or multimedia artworks; reciting slogans, speeches, or poetry; playing trumpets, accordions, bagpipes, or other musical instruments; and/or wearing conspicuous costumes, makeup, wigs, clown noses, or other decorative prostheses;

H. Award nominal damages against Defendant NEA and punitive damages in an amount to be proven at trial.

I. Award attorneys fees pursuant to 42 U.S.C. § 1988 and California Code of Civil Procedure § 1021.5, and costs as provided by law; and

J. Award such other and further relief as the Court deems just and proper.

Dated: August 30, 2019

Respectfully submitted,

s/ Damion Robinson

David W. Affeld

Damion D. D. Robinson

Affeld Grivakes LLP

Attorneys for Plaintiff Michael Zeleny

**DEMAND FOR JURY TRIAL**

Plaintiff demands a jury trial on all matters so triable.

Dated: August 30, 2019

Respectfully submitted,

s/ Damion Robinson

David W. Affeld

Damion D. D. Robinson

Affeld Grivakes LLP

Attorneys for Plaintiff Michael Zeleny

## Exhibit A





**PROOF OF SERVICE**

I hereby certify that on August 30, 2019, I electronically filed the foregoing document using the Court's CM/ECF system. I am informed and believe that the CM/ECF system will send a notice of electronic filing to the interested parties.

s/ Damion Robinson

Damion Robinson

# **EXHIBIT 2**

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8 *Becerra*

9  
10 IN THE UNITED STATES DISTRICT COURT  
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO DIVISION  
13

14 **MICHAEL ZELENY, an individual,**

15 Plaintiff,

16 v.

17 **GAVIN NEWSOM, et al.,**

18 Defendants.  
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CV 17-7357 JCS

**DEFENDANT ATTORNEY GENERAL  
XAVIER BECERRA'S ANSWER TO  
PLAINTIFF MICHAEL ZELENY'S  
SECOND AMENDED COMPLAINT**

Judge: The Honorable Richard G.  
Seeborg  
Action Filed: December 28, 2017  
Trial Date: June 8, 2020

Xavier Becerra, in his official capacity as Attorney General of the State of California,  
hereby responds to Plaintiff Michael Zeleny's Second Amended Complaint as follows:

## INTRODUCTION

1. The allegations contained in paragraph 1 are Plaintiff Zeleny's characterization of his case, to which no answer is required. To the extent they may be deemed allegations of fact, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

2. The allegations contained in paragraph 2 are Plaintiff Zeleny's characterization of his case, to which no answer is required. To the extent they may be deemed allegations of fact, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

3. The allegations contained in paragraph 3 are Plaintiff Zeleny's characterization of his case, to which no answer is required. To the extent they may be deemed allegations of fact, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

4. The allegations contained in paragraph 4 are Plaintiff Zeleny's characterization of his case, to which no answer is required. To the extent they may be deemed allegations of fact, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

5. The allegations contained in paragraph 5 are Plaintiff Zeleny's characterization of his case, to which no answer is required. To the extent they may be deemed allegations of fact, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

6. The allegations contained in paragraph 6 are Plaintiff Zeleny's characterization of his case, to which no answer is required. To the extent they may be deemed allegations of fact, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

/ / /

7. In response to the allegations contained in paragraph 7 of the Second Amended Complaint, Defendant Becerra admits that Plaintiff Zeleny has asserted claims under 42 U.S.C. § 1983. Defendant Becerra denies that the California statutes Plaintiff Zeleny alleges were invoked or applied against him are unconstitutional. Defendant Becerra denies that Plaintiff Zeleny has asserted any claims pursuant to the California Constitution. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

8. In response to the allegations contained in paragraph 8 of the Second Amended Complaint, Defendant Becerra denies that Plaintiff Zeleny challenges the facial validity of California statutes restricting the public display of unloaded firearms, specifically California Penal Code sections 26400 and 26350. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

#### **JURISDICTION AND VENUE**

9. In response to the allegations contained in paragraph 9 of the Second Amended Complaint, Defendant Becerra admits the content of the First, Second, and Fourteenth Amendments to the United States Constitution and the federal Civil Rights Act, 42 U.S.C. §§ 1983 and 1988. Defendant Becerra denies that Plaintiff Zeleny is entitled to any relief under the First, Second, and Fourteenth Amendments to the United States Constitution or the federal Civil Rights Act, 42 U.S.C. §§ 1983 and 1988.

10. In response to the allegations contained in paragraph 10 of the Second Amended Complaint, Defendant Becerra admits the content of 28 U.S.C. §§ 1331 and 1343.

11. In response to the allegations contained in paragraph 11 of the Second Amended Complaint, Defendant Becerra admits the content of 28 U.S.C. §§ 2201 and 2202. Defendant Becerra denies Plaintiff Zeleny is entitled to the requested declaratory judgment.

12. In response to the allegations contained in paragraph 12 of the Second Amended Complaint, Defendant Becerra admits the content of 42 U.S.C. § 1983 and Rule 65 of the Federal

1 Rules of Civil Procedure. Defendant Becerra denies Plaintiff Zeleny is entitled to the requested  
2 injunctive relief.

3 13. In response to the allegations contained in paragraph 13 of the Second Amended  
4 Complaint, Defendant Becerra admits the content of 42 U.S.C. § 1988. Defendant Becerra denies  
5 Plaintiff Zeleny is entitled to an award of attorney's fees and/or costs.

6 14. In response to the allegations contained in paragraph 14 of the Second Amended  
7 Complaint, Defendant Becerra admits the content of 28 U.S.C. § 1367(a) and California Code of  
8 Civil Procedure section 1021.5. Defendant Becerra denies Plaintiff Zeleny has asserted any legal  
9 claims under the California Constitution. Defendant Becerra also denies that Plaintiff Zeleny is  
10 entitled to an award of attorney's fees and/or costs.

11 15. In response to the allegations contained in paragraph 15 of the Second Amended  
12 Complaint, Defendant Becerra denies committing any unlawful acts. Indeed, the Second  
13 Amended Complaint lacks any allegations demonstrating any unlawful acts by Defendant  
14 Becerra. As to the remaining allegations, Defendant Becerra lacks knowledge or information  
15 sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations  
16 therein.

17 16. In response to the allegations contained in paragraph 16 of the Second Amended  
18 Complaint, Defendant Becerra admits the content of 28 U.S.C. § 1391(b). Defendant Becerra  
19 denies engaging in any acts which would give rise to Plaintiff Zeleny's action. As to the  
20 remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a  
21 belief as to the truth of the allegations and, therefore, denies the allegations therein.

## 22 **THE PARTIES**

23 17. The allegations contained in paragraph 17 are Plaintiff's characterization of his case,  
24 to which no answer is required. To the extent they may be deemed allegations of fact, Defendant  
25 Becerra lacks knowledge or information sufficient to form a belief as to the truth of the  
26 allegations and, therefore, denies the allegations therein.

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1           18. In response to the allegations contained in paragraph 18 of the Second Amended  
2 Complaint, Defendant Becerra admits he is the Attorney General of the State of California.  
3 Defendant Becerra admits that he is a resident of California, and a citizen of the United States.

4           19. In response to the allegations contained in paragraph 19 of the Second Amended  
5 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
6 truth of the allegations and, therefore, denies the allegations therein.

7           20. In response to the allegations contained in paragraph 20 of the Second Amended  
8 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
9 truth of the allegations and, therefore, denies the allegations therein.

10           21. In response to the allegations contained in paragraph 21 of the Second Amended  
11 Complaint, Defendant Becerra denies that he engaged in any of the unlawful acts and omissions  
12 alleged in the Second Amended Complaint. Indeed, the Second Amended Complaint lacks any  
13 allegations demonstrating any unlawful acts by Defendant Becerra. As to the remaining  
14 allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to  
15 the truth of the allegations and, therefore, denies the allegations therein.

16           22. In response to the allegations contained in paragraph 22 of the Second Amended  
17 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
18 truth of the allegations and, therefore, denies the allegations therein.

19           23. In response to the allegations contained in paragraph 23 of the Second Amended  
20 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
21 truth of the allegations and, therefore, denies the allegations therein.

22                           **FACTS**

23           24. In response to the allegations contained in paragraph 24 of the Second Amended  
24 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
25 truth of the allegations and, therefore, denies the allegations therein.

26           25. In response to the allegations contained in paragraph 25 of the Second Amended  
27 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
28 truth of the allegations and, therefore, denies the allegations therein.

1           26. In response to the allegations contained in paragraph 26 of the Second Amended  
2 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
3 truth of the allegations and, therefore, denies the allegations therein.

4           27. In response to the allegations contained in paragraph 27 of the Second Amended  
5 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
6 truth of the allegations and, therefore, denies the allegations therein.

7           28. In response to the allegations contained in paragraph 28 of the Second Amended  
8 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
9 truth of the allegations and, therefore, denies the allegations therein.

10          29. In response to the allegations contained in paragraph 29 of the Second Amended  
11 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
12 truth of the allegations and, therefore, denies the allegations therein.

13          30. In response to the allegations contained in paragraph 30 of the Second Amended  
14 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
15 truth of the allegations and, therefore, denies the allegations therein.

16          31. In response to the allegations contained in paragraph 31 of the Second Amended  
17 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
18 truth of the allegations and, therefore, denies the allegations therein.

19          32. In response to the allegations contained in paragraph 32 of the Second Amended  
20 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
21 truth of the allegations and, therefore, denies the allegations therein.

22          33. In response to the allegations contained in paragraph 33 of the Second Amended  
23 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
24 truth of the allegations and, therefore, denies the allegations therein.

25          34. In response to the allegations contained in paragraph 34 of the Second Amended  
26 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
27 truth of the allegations and, therefore, denies the allegations therein.

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1           35. In response to the allegations contained in paragraph 35 of the Second Amended  
2 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
3 truth of the allegations and, therefore, denies the allegations therein.

4           36. In response to the allegations contained in paragraph 36 of the Second Amended  
5 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
6 truth of the allegations and, therefore, denies the allegations therein.

7           37. In response to the allegations contained in paragraph 37 of the Second Amended  
8 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
9 truth of the allegations and, therefore, denies the allegations therein.

10          38. In response to the allegations contained in paragraph 38 of the Second Amended  
11 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
12 truth of the allegations and, therefore, denies the allegations therein.

13          39. In response to the allegations contained in paragraph 39 of the Second Amended  
14 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
15 truth of the allegations and, therefore, denies the allegations therein.

16          40. In response to the allegations contained in paragraph 40 of the Second Amended  
17 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
18 truth of the allegations and, therefore, denies the allegations therein.

19          41. In response to the allegations contained in paragraph 41 of the Second Amended  
20 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
21 truth of the allegations and, therefore, denies the allegations therein.

22          42. In response to the allegations contained in paragraph 42 of the Second Amended  
23 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
24 truth of the allegations and, therefore, denies the allegations therein.

25          43. In response to the allegations contained in paragraph 43 of the Second Amended  
26 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
27 truth of the allegations and, therefore, denies the allegations therein.

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1           44. In response to the allegations contained in paragraph 44 of the Second Amended  
2 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
3 truth of the allegations and, therefore, denies the allegations therein.

4           45. In response to the allegations contained in paragraph 45 of the Second Amended  
5 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
6 truth of the allegations and, therefore, denies the allegations therein.

7           46. In response to the allegations contained in paragraph 46 of the Second Amended  
8 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
9 truth of the allegations and, therefore, denies the allegations therein.

10           47. In response to the allegations contained in paragraph 47 of the Second Amended  
11 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
12 truth of the allegations and, therefore, denies the allegations therein.

13           48. In response to the allegations contained in paragraph 48 of the Second Amended  
14 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
15 truth of the allegations and, therefore, denies the allegations therein.

16           49. In response to the allegations contained in paragraph 49 of the Second Amended  
17 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
18 truth of the allegations and, therefore, denies the allegations therein.

19           50. In response to the allegations contained in paragraph 50 of the Second Amended  
20 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
21 truth of the allegations and, therefore, denies the allegations therein.

22           51. In response to the allegations contained in paragraph 51 of the Second Amended  
23 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
24 truth of the allegations and, therefore, denies the allegations therein.

25           52. In response to the allegations contained in paragraph 52 of the Second Amended  
26 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
27 truth of the allegations and, therefore, denies the allegations therein.

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1           53. In response to the allegations contained in paragraph 53 of the Second Amended  
2 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
3 truth of the allegations and, therefore, denies the allegations therein.

4           54. In response to the allegations contained in paragraph 54 of the Second Amended  
5 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
6 truth of the allegations and, therefore, denies the allegations therein.

7           55. In response to the allegations contained in paragraph 55 of the Second Amended  
8 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
9 truth of the allegations and, therefore, denies the allegations therein.

10          56. In response to the allegations contained in paragraph 56 of the Second Amended  
11 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
12 truth of the allegations and, therefore, denies the allegations therein.

13          57. In response to the allegations contained in paragraph 57 of the Second Amended  
14 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
15 truth of the allegations and, therefore, denies the allegations therein.

16          58. In response to the allegations contained in paragraph 58 of the Second Amended  
17 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
18 truth of the allegations and, therefore, denies the allegations therein.

19          59. In response to the allegations contained in paragraph 59 of the Second Amended  
20 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
21 truth of the allegations and, therefore, denies the allegations therein.

22          60. In response to the allegations contained in paragraph 60 of the Second Amended  
23 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
24 truth of the allegations and, therefore, denies the allegations therein.

25          61. In response to the allegations contained in paragraph 61 of the Second Amended  
26 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
27 truth of the allegations and, therefore, denies the allegations therein.

28       / / /

1           62. In response to the allegations contained in paragraph 62 of the Second Amended  
2 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
3 truth of the allegations and, therefore, denies the allegations therein.

4           63. In response to the allegations contained in paragraph 63 of the Second Amended  
5 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
6 truth of the allegations and, therefore, denies the allegations therein.

7           64. In response to the allegations contained in paragraph 64 of the Second Amended  
8 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
9 truth of the allegations and, therefore, denies the allegations therein.

10          65. In response to the allegations contained in paragraph 65 of the Second Amended  
11 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
12 truth of the allegations and, therefore, denies the allegations therein.

13          66. In response to the allegations contained in paragraph 66 of the Second Amended  
14 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
15 truth of the allegations and, therefore, denies the allegations therein.

16          67. In response to the allegations contained in paragraph 67 of the Second Amended  
17 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
18 truth of the allegations and, therefore, denies the allegations therein.

19          68. In response to the allegations contained in paragraph 68 of the Second Amended  
20 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
21 truth of the allegations and, therefore, denies the allegations therein.

22          69. In response to the allegations contained in paragraph 69 of the Second Amended  
23 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
24 truth of the allegations and, therefore, denies the allegations therein.

25          70. In response to the allegations contained in paragraph 70 of the Second Amended  
26 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
27 truth of the allegations and, therefore, denies the allegations therein.

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1           71. In response to the allegations contained in paragraph 71 of the Second Amended  
2 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
3 truth of the allegations and, therefore, denies the allegations therein.

4           72. In response to the allegations contained in paragraph 72 of the Second Amended  
5 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
6 truth of the allegations and, therefore, denies the allegations therein.

7           73. In response to the allegations contained in paragraph 73 of the Second Amended  
8 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
9 truth of the allegations and, therefore, denies the allegations therein.

10          74. In response to the allegations contained in paragraph 74 of the Second Amended  
11 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
12 truth of the allegations and, therefore, denies the allegations therein.

13          75. In response to the allegations contained in paragraph 75 of the Second Amended  
14 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
15 truth of the allegations and, therefore, denies the allegations therein.

16          76. In response to the allegations contained in paragraph 76 of the Second Amended  
17 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
18 truth of the allegations and, therefore, denies the allegations therein.

19          77. In response to the allegations contained in paragraph 77 of the Second Amended  
20 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
21 truth of the allegations and, therefore, denies the allegations therein.

22          78. In response to the allegations contained in paragraph 78 of the Second Amended  
23 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
24 truth of the allegations and, therefore, denies the allegations therein.

25          79. In response to the allegations contained in paragraph 79 of the Second Amended  
26 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
27 truth of the allegations and, therefore, denies the allegations therein.

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1           80. In response to the allegations contained in paragraph 80 of the Second Amended  
2 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
3 truth of the allegations and, therefore, denies the allegations therein.

4           81. In response to the allegations contained in paragraph 81 of the Second Amended  
5 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
6 truth of the allegations and, therefore, denies the allegations therein.

7           82. In response to the allegations contained in paragraph 82 of the Second Amended  
8 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
9 truth of the allegations and, therefore, denies the allegations therein.

10          83. In response to the allegations contained in paragraph 83 of the Second Amended  
11 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
12 truth of the allegations and, therefore, denies the allegations therein.

13          84. In response to the allegations contained in paragraph 84 of the Second Amended  
14 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
15 truth of the allegations and, therefore, denies the allegations therein.

16          85. In response to the allegations contained in paragraph 85 of the Second Amended  
17 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
18 truth of the allegations and, therefore, denies the allegations therein.

19          86. In response to the allegations contained in paragraph 86 of the Second Amended  
20 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
21 truth of the allegations and, therefore, denies the allegations therein.

22          87. In response to the allegations contained in paragraph 87 of the Second Amended  
23 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
24 truth of the allegations and, therefore, denies the allegations therein.

25          88. In response to the allegations contained in paragraph 88 of the Second Amended  
26 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
27 truth of the allegations and, therefore, denies the allegations therein.

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1           89. In response to the allegations contained in paragraph 89 of the Second Amended  
2 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
3 truth of the allegations and, therefore, denies the allegations therein.

4           90. In response to the allegations contained in paragraph 90 of the Second Amended  
5 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
6 truth of the allegations and, therefore, denies the allegations therein.

7           91. In response to the allegations contained in paragraph 91 of the Second Amended  
8 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
9 truth of the allegations and, therefore, denies the allegations therein.

10          92. In response to the allegations contained in paragraph 92 of the Second Amended  
11 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
12 truth of the allegations and, therefore, denies the allegations therein.

13          93. In response to the allegations contained in paragraph 93 of the Second Amended  
14 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
15 truth of the allegations and, therefore, denies the allegations therein.

16          94. In response to the allegations contained in paragraph 94 of the Second Amended  
17 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
18 truth of the allegations and, therefore, denies the allegations therein.

19          95. In response to the allegations contained in paragraph 95 of the Second Amended  
20 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
21 truth of the allegations and, therefore, denies the allegations therein.

22          96. In response to the allegations contained in paragraph 96 of the Second Amended  
23 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
24 truth of the allegations and, therefore, denies the allegations therein.

25          97. In response to the allegations contained in paragraph 97 of the Second Amended  
26 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
27 truth of the allegations and, therefore, denies the allegations therein.

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1           98. The allegations contained in paragraph 98 of the Second Amended Complaint consist  
2 of legal argument and/or conclusions, which do not require admission or denial. To the extent  
3 they may be deemed allegations of fact, Defendant Becerra lacks knowledge or information  
4 sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations  
5 therein.

6           99. In response to the allegations contained in paragraph 99 of the Second Amended  
7 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
8 truth of the allegations and, therefore, denies the allegations therein.

9           100. In response to the allegations contained in paragraph 100 of the Second Amended  
10 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
11 truth of the allegations and, therefore, denies the allegations therein.

12           101. In response to the allegations contained in paragraph 101 of the Second Amended  
13 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
14 truth of the allegations and, therefore, denies the allegations therein.

15           102. In response to the allegations contained in paragraph 102 of the Second Amended  
16 Complaint, Defendant Becerra admits that California Penal Code §§ 26350 and 26405 generally  
17 prohibit persons from openly carrying unloaded firearms, subject to some exceptions. As to the  
18 remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a  
19 belief as to the truth of the allegations and, therefore, denies the allegations therein.

20           103. In response to the allegations contained in paragraph 103 of the Second Amended  
21 Complaint, Defendant Becerra admits that California Penal Code §§ 26350 and 26405 generally  
22 prohibit persons from openly carrying unloaded firearms, subject to some exceptions. As to the  
23 remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a  
24 belief as to the truth of the allegations and, therefore, denies the allegations therein.

25           104. In response to the allegations contained in paragraph 104 of the Second Amended  
26 Complaint, Defendant Becerra admits that California Penal Code § 26350 generally prohibits  
27 persons from openly carrying unloaded firearms, subject to some exceptions. As to the remaining  
28

1 allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to  
2 the truth of the allegations and, therefore, denies the allegations therein.

3 105. In response to the allegations contained in paragraph 105 of the Second Amended  
4 Complaint, Defendant Becerra admits the content of California Penal Code § 26375. As to the  
5 remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a  
6 belief as to the truth of the allegations and, therefore, denies the allegations therein.

7 106. In response to the allegations contained in paragraph 106 of the Second Amended  
8 Complaint, Defendant Becerra admits the content of California Penal Code § 26400. As to the  
9 remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a  
10 belief as to the truth of the allegations and, therefore, denies the allegations therein.

11 107. In response to the allegations contained in paragraph 107 of the Second Amended  
12 Complaint, Defendant Becerra admits the content of California Penal Code § 26405(r). As to the  
13 remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a  
14 belief as to the truth of the allegations and, therefore, denies the allegations therein.

15 108. In response to the allegations contained in paragraph 108 of the Second Amended  
16 Complaint, Defendant Becerra admits the content of California Penal Code § 25510. As to the  
17 remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a  
18 belief as to the truth of the allegations and, therefore, denies the allegations therein.

19 109. In response to the allegations contained in paragraph 109 of the Second Amended  
20 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
21 truth of the allegations and, therefore, denies the allegations therein.

22 110. In response to the allegations contained in paragraph 110 of the Second Amended  
23 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
24 truth of the allegations and, therefore, denies the allegations therein.

25 111. The allegations contained in paragraph 111 of the Second Amended Complaint  
26 consist of legal argument and/or conclusions, which do not require admission or denial. To the  
27 extent they may be deemed allegations of fact, Defendant Becerra lacks knowledge or  
28

1 information sufficient to form a belief as to the truth of the allegations and, therefore, denies the  
2 allegations therein.

3 112. The allegations contained in paragraph 112 of the Second Amended Complaint  
4 consist of legal argument and/or conclusions, which do not require admission or denial. To the  
5 extent they may be deemed allegations of fact, Defendant Becerra lacks knowledge or  
6 information sufficient to form a belief as to the truth of the allegations and, therefore, denies the  
7 allegations therein.

8 113. The allegations contained in paragraph 113 of the Second Amended Complaint  
9 consist of legal argument and/or conclusions, which do not require admission or denial. To the  
10 extent they may be deemed allegations of fact, Defendant Becerra lacks knowledge or  
11 information sufficient to form a belief as to the truth of the allegations and, therefore, denies the  
12 allegations therein.

13 114. The allegations contained in paragraph 114 of the Second Amended Complaint  
14 consist of legal argument and/or conclusions, which do not require admission or denial. To the  
15 extent they may be deemed allegations of fact, Defendant Becerra lacks knowledge or  
16 information sufficient to form a belief as to the truth of the allegations and, therefore, denies the  
17 allegations therein.

18 115. The allegations contained in paragraph 115 of the Second Amended Complaint  
19 consist of legal argument and/or conclusions, which do not require admission or denial. To the  
20 extent they may be deemed allegations of fact, Defendant Becerra lacks knowledge or  
21 information sufficient to form a belief as to the truth of the allegations and, therefore, denies the  
22 allegations therein.

23 116. In response to the allegations contained in paragraph 116 of the Second Amended  
24 Complaint, Defendant Becerra denies suppressing or threatening to suppress Plaintiff Zeleny's  
25 lawful exercise of his Constitutional rights. As to the remaining allegations, Defendant Becerra  
26 lacks knowledge or information sufficient to form a belief as to the truth of the allegations and,  
27 therefore, denies the allegations therein.

28 / / /

1           117. The allegations contained in paragraph 117 of the Second Amended Complaint  
2 consist of legal argument and/or conclusions, which do not require admission or denial. To the  
3 extent they may be deemed allegations of fact, Defendant Becerra lacks knowledge or  
4 information sufficient to form a belief as to the truth of the allegations and, therefore, denies the  
5 allegations therein.

6           118. In response to the allegations contained in paragraph 118 of the Second Amended  
7 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
8 truth of the allegations and, therefore, denies the allegations therein.

9           119. In response to the allegations contained in paragraph 119 of the Second Amended  
10 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
11 truth of the allegations and, therefore, denies the allegations therein.

12           120. In response to the allegations contained in paragraph 120 of the Second Amended  
13 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
14 truth of the allegations and, therefore, denies the allegations therein.

15           121. In response to the allegations contained in paragraph 121 of the Second Amended  
16 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
17 truth of the allegations and, therefore, denies the allegations therein.

18           122. In response to the allegations contained in paragraph 122 of the Second Amended  
19 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
20 truth of the allegations and, therefore, denies the allegations therein.

21           123. In response to the allegations contained in paragraph 123 of the Second Amended  
22 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
23 truth of the allegations and, therefore, denies the allegations therein.

24           124. In response to the allegations contained in paragraph 124 of the Second Amended  
25 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
26 truth of the allegations and, therefore, denies the allegations therein.

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1           125. In response to the allegations contained in paragraph 125 of the Second Amended  
2 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
3 truth of the allegations and, therefore, denies the allegations therein.

4           126. In response to the allegations contained in paragraph 126 of the Second Amended  
5 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
6 truth of the allegations and, therefore, denies the allegations therein.

7           127. In response to the allegations contained in paragraph 127 of the Second Amended  
8 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
9 truth of the allegations and, therefore, denies the allegations therein.

10           128. In response to the allegations contained in paragraph 128 of the Second Amended  
11 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
12 truth of the allegations and, therefore, denies the allegations therein.

13           129. In response to the allegations contained in paragraph 129 of the Second Amended  
14 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
15 truth of the allegations and, therefore, denies the allegations therein.

16           130. In response to the allegations contained in paragraph 130 of the Second Amended  
17 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
18 truth of the allegations and, therefore, denies the allegations therein.

19           131. In response to the allegations contained in paragraph 131 of the Second Amended  
20 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
21 truth of the allegations and, therefore, denies the allegations therein.

22           132. In response to the allegations contained in paragraph 132 of the Second Amended  
23 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
24 truth of the allegations and, therefore, denies the allegations therein.

25           133. In response to the allegations contained in paragraph 133 of the Second Amended  
26 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
27 truth of the allegations and, therefore, denies the allegations therein.

28       / / /



1           134. In response to the allegations contained in paragraph 134 of the Second Amended  
2 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
3 truth of the allegations and, therefore, denies the allegations therein.

4           135. In response to the allegations contained in paragraph 135 of the Second Amended  
5 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
6 truth of the allegations and, therefore, denies the allegations therein.

7           136. In response to the allegations contained in paragraph 136 of the Second Amended  
8 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
9 truth of the allegations and, therefore, denies the allegations therein.

10          137. In response to the allegations contained in paragraph 137 of the Second Amended  
11 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
12 truth of the allegations and, therefore, denies the allegations therein.

13          138. In response to the allegations contained in paragraph 138 of the Second Amended  
14 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
15 truth of the allegations and, therefore, denies the allegations therein.

16          139. In response to the allegations contained in paragraph 139 of the Second Amended  
17 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
18 truth of the allegations and, therefore, denies the allegations therein.

19          140. In response to the allegations contained in paragraph 140 of the Second Amended  
20 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
21 truth of the allegations and, therefore, denies the allegations therein.

22          141. In response to the allegations contained in paragraph 141 of the Second Amended  
23 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
24 truth of the allegations and, therefore, denies the allegations therein.

25          142. In response to the allegations contained in paragraph 142 of the Second Amended  
26 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
27 truth of the allegations and, therefore, denies the allegations therein.

28       / / /

1           143. In response to the allegations contained in paragraph 143 of the Second Amended  
2 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
3 truth of the allegations and, therefore, denies the allegations therein.

4           144. In response to the allegations contained in paragraph 144 of the Second Amended  
5 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
6 truth of the allegations and, therefore, denies the allegations therein.

7           145. In response to the allegations contained in paragraph 145 of the Second Amended  
8 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
9 truth of the allegations and, therefore, denies the allegations therein.

10           146. In response to the allegations contained in paragraph 146 of the Second Amended  
11 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
12 truth of the allegations and, therefore, denies the allegations therein.

13           147. In response to the allegations contained in paragraph 147 of the Second Amended  
14 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
15 truth of the allegations and, therefore, denies the allegations therein.

16           148. In response to the allegations contained in paragraph 148 of the Second Amended  
17 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
18 truth of the allegations and, therefore, denies the allegations therein.

19           149. In response to the allegations contained in paragraph 149 of the Second Amended  
20 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
21 truth of the allegations and, therefore, denies the allegations therein.

22           150. In response to the allegations contained in paragraph 150 of the Second Amended  
23 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
24 truth of the allegations and, therefore, denies the allegations therein.

25           151. In response to the allegations contained in paragraph 151 of the Second Amended  
26 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
27 truth of the allegations and, therefore, denies the allegations therein.

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1           152. In response to the allegations contained in paragraph 152 of the Second Amended  
2 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
3 truth of the allegations and, therefore, denies the allegations therein.

4           153. In response to the allegations contained in paragraph 153 of the Second Amended  
5 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
6 truth of the allegations and, therefore, denies the allegations therein.

7           154. In response to the allegations contained in paragraph 154 of the Second Amended  
8 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
9 truth of the allegations and, therefore, denies the allegations therein.

10          155. In response to the allegations contained in paragraph 155 of the Second Amended  
11 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
12 truth of the allegations and, therefore, denies the allegations therein.

13          156. In response to the allegations contained in paragraph 156 of the Second Amended  
14 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
15 truth of the allegations and, therefore, denies the allegations therein.

16          157. In response to the allegations contained in paragraph 157 of the Second Amended  
17 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
18 truth of the allegations and, therefore, denies the allegations therein.

19          158. In response to the allegations contained in paragraph 158 of the Second Amended  
20 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
21 truth of the allegations and, therefore, denies the allegations therein.

22          159. In response to the allegations contained in paragraph 159 of the Second Amended  
23 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
24 truth of the allegations and, therefore, denies the allegations therein.

25          160. In response to the allegations contained in paragraph 160 of the Second Amended  
26 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
27 truth of the allegations and, therefore, denies the allegations therein.

28       / / /

1           161. In response to the allegations contained in paragraph 161 of the Second Amended  
2 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
3 truth of the allegations and, therefore, denies the allegations therein.

4           162. In response to the allegations contained in paragraph 162 of the Second Amended  
5 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
6 truth of the allegations and, therefore, denies the allegations therein.

7           163. In response to the allegations contained in paragraph 163 of the Second Amended  
8 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
9 truth of the allegations and, therefore, denies the allegations therein.

10           164. In response to the allegations contained in paragraph 164 of the Second Amended  
11 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
12 truth of the allegations and, therefore, denies the allegations therein.

13           165. In response to the allegations contained in paragraph 165 of the Second Amended  
14 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
15 truth of the allegations and, therefore, denies the allegations therein.

16           166. In response to the allegations contained in paragraph 166 of the Second Amended  
17 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
18 truth of the allegations and, therefore, denies the allegations therein.

19           167. The allegations contained in paragraph 167 are Plaintiff Zeleny's characterization of  
20 his case, to which no answer is required. To the extent they may be deemed allegations of fact,  
21 Defendant Becerra admits that Defendant Bertini contacted the California Department of Justice  
22 regarding the Entertainment Firearms Permit issued by the California Department of Justice to  
23 Plaintiff Zeleny in 2016. An Entertainment Firearms Permit certifies that the California  
24 Department of Justice has completed a firearms eligibility check and, as of the date of issuance,  
25 there is nothing that would prohibit the named permitholder from the possession of firearms  
26 loaned to the permittee for use in a motion picture, television, video, theatrical, or other  
27 entertainment production pursuant to California Penal Code §§ 29500 through 29530. As to the  
28

1 remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a  
2 belief as to the truth of the allegations and, therefore, denies the allegations therein.

3 168. In response to the allegations contained in paragraph 168 of the Second Amended  
4 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
5 truth of the allegations and, therefore, denies the allegations therein.

6 169. In response to the allegations contained in paragraph 169 of the Second Amended  
7 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
8 truth of the allegations and, therefore, denies the allegations therein.

9 170. In response to the allegations contained in paragraph 170 of the Second Amended  
10 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
11 truth of the allegations and, therefore, denies the allegations therein.

12 171. The allegations contained in paragraph 171 of the Second Amended Complaint are  
13 Plaintiff Zeleny's characterization of his case, to which no answer is required. To the extent they  
14 may be deemed allegations of fact, Defendant Becerra admits that Defendant Bertini contacted  
15 the California Department of Justice regarding the Entertainment Firearms Permit issued by the  
16 California Department of Justice to Plaintiff Zeleny in 2016. As to the remaining allegations,  
17 Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the  
18 allegations and, therefore, denies the allegations therein.

19 172. The allegations contained in paragraph 172 of the Second Amended Complaint are  
20 Plaintiff Zeleny's characterization of his case, to which no answer is required. To the extent they  
21 may be deemed allegations of fact, Defendant Becerra admits that Defendant Bertini contacted  
22 the California Department of Justice regarding the Entertainment Firearms Permit issued by the  
23 California Department of Justice to Plaintiff Zeleny in 2016. As to the remaining allegations,  
24 Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the  
25 allegations and, therefore, denies the allegations therein.

26 173. In response to the allegations contained in paragraph 173 of the Second Amended  
27 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
28 truth of the allegations and, therefore, denies the allegations therein.

1           174. In response to the allegations contained in paragraph 174 of the Second Amended  
2 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
3 truth of the allegations and, therefore, denies the allegations therein.

4           175. In response to the allegations contained in paragraph 175 of the Second Amended  
5 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
6 truth of the allegations and, therefore, denies the allegations therein.

7           176. In response to the allegations contained in paragraph 176 of the Second Amended  
8 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
9 truth of the allegations and, therefore, denies the allegations therein.

10          177. In response to the allegations contained in paragraph 177 of the Second Amended  
11 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
12 truth of the allegations and, therefore, denies the allegations therein.

13          178. In response to the allegations contained in paragraph 178 of the Second Amended  
14 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
15 truth of the allegations and, therefore, denies the allegations therein.

16          179. In response to the allegations contained in paragraph 179 of the Second Amended  
17 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
18 truth of the allegations and, therefore, denies the allegations therein.

19          180. In response to the allegations contained in paragraph 180 of the Second Amended  
20 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
21 truth of the allegations and, therefore, denies the allegations therein.

22          181. In response to the allegations contained in paragraph 181 of the Second Amended  
23 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
24 truth of the allegations and, therefore, denies the allegations therein.

25          182. In response to the allegations contained in paragraph 182 of the Second Amended  
26 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
27 truth of the allegations and, therefore, denies the allegations therein.

28       / / /



183. In response to the allegations contained in paragraph 183 of the Second Amended Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

184. In response to the allegations contained in paragraph 184 of the Second Amended Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

185. In response to the allegations contained in paragraph 185 of the Second Amended Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

186. In response to the allegations contained in paragraph 186 of the Second Amended Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

## DECLARATORY RELIEF

187. In response to the allegations contained in paragraph 187 of the Second Amended Complaint, Defendant Becerra denies that an actual, substantial, justiciable, and continuing controversy exists between Plaintiff Zeleny and himself. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

188. The allegations contained in paragraph 188 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. To the extent they may be deemed allegations of fact, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

189. The allegations contained in paragraph 189 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. To the extent they may be deemed allegations of fact, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.



190. The allegations contained in paragraph 190 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. To the extent they may be deemed allegations of fact, Defendant Becerra admits the content of California Penal Code §§ 26350 and 26400, but denies that those statutes are unconstitutional. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

191. The allegations contained in paragraph 191 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. To the extent they may be deemed allegations of fact, Defendant Becerra admits the content of California Penal Code §§ 25510, 26375, and 26405. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

192. The allegations contained in paragraph 192 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. To the extent they may be deemed allegations of fact, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

193. The allegations contained in paragraph 193 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. To the extent they may be deemed allegations of fact, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

## FIRST COUNT

194. In response to the allegations contained in paragraph 194 of the Second Amended Complaint, Defendant Becerra repeats his responses to the allegations contained in paragraphs 1-193 as though set forth fully herein.

195. In response to the allegations contained in paragraph 195 of the Second Amended Complaint, Defendant Becerra admits the content of the First Amendment to the United States

1 Constitution and the Due Process Clause of the Fourteenth Amendment to the United States  
2 Constitution. Defendant Becerra contends that the remainder of the paragraph consists of legal  
3 argument and/or conclusions, which do not require admission or denial.

4 196. In response to the allegations contained in paragraph 196 of the Second Amended  
5 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
6 truth of the allegations and, therefore, denies the allegations therein.

7 197. In response to the allegations contained in paragraph 197 of the Second Amended  
8 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
9 truth of the allegations and, therefore, denies the allegations therein.

10 198. In response to the allegations contained in paragraph 198 of the Second Amended  
11 Complaint, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the  
12 truth of the allegations and, therefore, denies the allegations therein.

13 199. The allegations contained in paragraph 199 of the Second Amended Complaint  
14 consist of legal argument and/or conclusions, which do not require admission or denial. To the  
15 extent they may be deemed allegations of fact, Defendant Becerra denies engaging in any  
16 unlawful acts as alleged in paragraph 199. Indeed, the Second Amended Complaint lacks any  
17 allegations demonstrating any unlawful acts by Defendant Becerra. As to the remaining  
18 allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to  
19 the truth of the allegations and, therefore, denies the allegations therein.

## 20 SECOND COUNT

21 200. In response to the allegations contained in paragraph 200 of the Second Amended  
22 Complaint, Defendant Becerra repeats his responses to the allegations contained in paragraphs 1-  
23 199 as though set forth fully herein.

24 201. In response to the allegations contained in paragraph 201 of the Second Amended  
25 Complaint, Defendant Becerra admits the content of the First Amendment to the United States  
26 Constitution and the Due Process Clause of the Fourteenth Amendment to the United States  
27 Constitution. Defendant Becerra contends that the remainder of the paragraph consists of legal  
28 argument and/or conclusions, which do not require admission or denial.

202. The allegations contained in paragraph 202 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

203. The allegations contained in paragraph 203 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

204. The allegations contained in paragraph 204 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

205. The allegations contained in paragraph 205 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

206. The allegations contained in paragraph 206 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. To the extent they may be deemed allegations of fact, Defendant Becerra denies engaging in any unlawful acts as alleged in paragraph 206. Indeed, the Second Amended Complaint lacks any allegations demonstrating any unlawful acts by Defendant Becerra. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

### **THIRD COUNT**

207. In response to the allegations contained in paragraph 207 of the Second Amended Complaint, Defendant Becerra repeats his responses to the allegations contained in paragraphs 1-206 as though set forth fully herein.

/ / /

208. In response to the allegations contained in paragraph 208 of the Second Amended Complaint, Defendant Becerra admits the content of the First and Second Amendments to the United States Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Defendant Becerra contends that the remainder of the paragraph consists of legal argument and/or conclusions, which do not require admission or denial.

209. The allegations contained in paragraph 209 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

210. The allegations contained in paragraph 210 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. Defendant Becerra denies that Plaintiff Zeleny has asserted a facial challenge to California Penal Code §§ 25510, 26375, or 26405. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

211. The allegations contained in paragraph 211 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

212. The allegations contained in paragraph 212 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

213. The allegations contained in paragraph 213 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

/ / /

214. The allegations contained in paragraph 214 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

215. The allegations contained in paragraph 215 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

216. The allegations contained in paragraph 216 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

217. The allegations contained in paragraph 217 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. To the extent they may be deemed allegations of fact, Defendant Becerra denies engaging in any unlawful acts as alleged in paragraph 217. Indeed, the Second Amended Complaint lacks any allegations demonstrating any unlawful acts by Defendant Becerra. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

#### **FOURTH COUNT**

218. In response to the allegations contained in paragraph 218 of the Second Amended Complaint, Defendant Becerra repeats his responses to the allegations contained in paragraphs 1-217 as though set forth fully herein.

219. The allegations contained in paragraph 219 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

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220. The allegations contained in paragraph 220 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

221. The allegations contained in paragraph 221 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

222. The allegations contained in paragraph 222 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

223. The allegations contained in paragraph 223 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. Defendant Becerra denies engaging in any unlawful acts as alleged in paragraph 223. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

224. The allegations contained in paragraph 224 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. Defendant Becerra denies engaging in any unlawful acts as alleged in paragraph 224. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

### FIFTH COUNT

225. In response to the allegations contained in paragraph 225 of the Second Amended Complaint, Defendant Becerra repeats his responses to the allegations contained in paragraphs 1-224 as though set forth fully herein.

226. The allegations contained in paragraph 226 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. As to the



1 remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a  
2 belief as to the truth of the allegations and, therefore, denies the allegations therein.

3 227. The allegations contained in paragraph 227 of the Second Amended Complaint  
4 consist of legal argument and/or conclusions, which do not require admission or denial. As to the  
5 remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a  
6 belief as to the truth of the allegations and, therefore, denies the allegations therein.

7 228. The allegations contained in paragraph 228 of the Second Amended Complaint  
8 consist of legal argument and/or conclusions, which do not require admission or denial.  
9 Defendant Becerra denies that Plaintiff Zeleny has asserted a claim under the California  
10 Constitution. As to the remaining allegations, Defendant Becerra lacks knowledge or information  
11 sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations  
12 therein.

13 229. In response to the allegations contained in paragraph 229 of the Second Amended  
14 Complaint, Defendant Becerra denies promulgating policies and/or procedures, conducted under  
15 color of state law, that deprived Plaintiff Zeleny of rights secured by the Equal Protection Clause  
16 of the Fourteenth Amendment to the United States Constitution. The remainder of the paragraph  
17 consists of legal argument and/or conclusions, which do not require admission or denial. To the  
18 extent admission or denial is required, Defendant Becerra lacks knowledge or information  
19 sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations  
20 therein.

### 21 **SIXTH COUNT**

22 230. In response to the allegations contained in paragraph 230 of the Second Amended  
23 Complaint, Defendant Becerra repeats his responses to the allegations contained in paragraphs 1-  
24 229 as though set forth fully herein.

25 231. The allegations contained in paragraph 231 of the Second Amended Complaint  
26 consist of legal argument and/or conclusions, which do not require admission or denial. As to the  
27 remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a  
28 belief as to the truth of the allegations and, therefore, denies the allegations therein.



232. The allegations contained in paragraph 232 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

233. The allegations contained in paragraph 233 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

234. The allegations contained in paragraph 234 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

235. The allegations contained in paragraph 235 of the Second Amended Complaint consist of legal argument and/or conclusions, which do not require admission or denial. As to the remaining allegations, Defendant Becerra lacks knowledge or information sufficient to form a belief as to the truth of the allegations and, therefore, denies the allegations therein.

### **PRAYER FOR RELIEF**

A. Defendant Becerra denies that Plaintiff Zeleny is entitled to a declaratory judgment, “pursuant to 28 U.S.C. § 2201, binding on all Defendants, that California Penal Code §§ 26400 and 26350 are unconstitutional.”

B. Defendant Becerra denies that Plaintiff Zeleny is entitled to a declaratory judgment, “pursuant to 28 U.S.C. § 2201, binding on all Defendants, that California Penal Code §§ 25510, 26375, and 26405 do not require municipal approval of ‘authorized participants’ in an entertainment event or film or video production, and that Zeleny is legally permitted to carry unloaded firearms in connection with his entertainment events and/or his film or video productions, without the need for City approval, subject to compliance with other applicable laws.”

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1 C. Defendant Becerra denies that Plaintiff Zeleny is entitled to a declaratory judgment,  
2 “pursuant to 28 U.S.C. § 2201, binding on all Defendants, that Zeleny’s peaceful carrying of  
3 unloaded firearms in the course of his speech on matters of public concern or matters of political,  
4 social, or other concerns to the community or issues of significant importance to the public as a  
5 whole, is constitutionally protected; in the alternative, enter a declaratory judgment, pursuant to  
6 28 U.S.C. § 2201, binding on all Defendants, that Zeleny’s peaceful carrying of unloaded  
7 firearms in the course of his entertainment events and/or his film or video productions, is  
8 constitutionally protected.”

9 D. Defendant Becerra denies that Plaintiff Zeleny is entitled to a declaratory judgment,  
10 “pursuant to 28 U.S.C. § 2201, binding on the City and Bertini, that Zeleny’s speech activity  
11 concerning the child rape cover-up by the Zhus and their associates is constitutionally protected  
12 and not obscene or ‘obscene as to minors’ within the meaning of the California Penal Code, and  
13 that their public display would not violate Penal Code §§ 311.2, 313.1(a), and 313.4, in virtue of  
14 its serious literary, artistic, political, and social value.”

15 E. Defendant Becerra denies that Plaintiff Zeleny is entitled to a declaratory judgment,  
16 “pursuant to 28 U.S.C. § 2201, that the City of Menlo Park’s Special Event Permit requirement is  
17 unconstitutional on its face, or in the alternative, as applied to Zeleny’s protests.”

18 F. Defendant Becerra denies that Plaintiff Zeleny is entitled to an injunction, “against  
19 Defendants prohibiting them from enforcing Penal Code §§ 26400 and 26350 against Zeleny in  
20 connection with his peaceful protests, from enforcing the City of Menlo Park’s Special Event  
21 Permit requirement, and from refusing to grant Zeleny required permits based on the content of  
22 his speech activity.”

23 G. Defendant Becerra denies that Plaintiff Zeleny is entitled to a declaratory judgment,  
24 “pursuant to 28 U.S.C. § 2201, construing California Penal Code §§ 25510, 26405, and 26375  
25 and enter a declaratory judgment stating that these sections exempt from sanctions under  
26 California Penal Code §§ 25400, 26400, and 26350 for the carrying of an unloaded handgun and  
27 of an unloaded firearm that is not a handgun, *any individual* who acts and/or holds himself out as  
28 an authorized participant in, or serves as an authorized employee or agent of a supplier of

1 firearms for, a motion picture, television or video production, or entertainment event, when the  
 2 participant lawfully uses that firearm as part of that production or event, as part of rehearsing or  
 3 practicing for participation in that production or event, or while the participant or authorized  
 4 employee or agent is at that production or event, or rehearsal or practice for that production or  
 5 event. Relevant actions and representations include, without limitation, displaying ornamental  
 6 signs or multimedia artworks; reciting slogans, speeches, or poetry; playing trumpets, accordions,  
 7 bagpipes, or other musical instruments; and/or wearing conspicuous costumes, makeup, wigs,  
 8 clown noses, or other decorative prostheses.”

9 H. Defendant Becerra denies that Plaintiff Zeleny is entitled to an award of nominal  
 10 damages against Defendant NEA and punitive damages in an amount to be proven at trial.

11 I. Defendant Becerra denies that Plaintiff Zeleny is entitled to an award of attorneys  
 12 fees pursuant to 42 U.S.C. § 1988 and California Code of Civil Procedure § 1021.5, and costs as  
 13 provided by law.

14 J. Defendant Becerra denies that Plaintiff Zeleny is entitled to an award of any such  
 15 other and further relief as the Court deems just and proper.

## 16 **DEFENSES**

### 17 **FIRST DEFENSE**

18 Plaintiff Zeleny fails to state a claim for relief against Defendant Becerra.

### 19 **SECOND DEFENSE**

20 Plaintiff Zeleny’s alleged violation of the Fourteenth Amendment to the United States  
 21 Constitution (Second Amended Complaint, ¶¶ 225-229) fails because no case or controversy  
 22 exists between Plaintiff Zeleny and Defendant Becerra.

### 23 **THIRD DEFENSE**

24 Plaintiff Zeleny’s alleged violation of the Fourteenth Amendment to the United States  
 25 Constitution (Second Amended Complaint, ¶¶ 225-229) is barred by the Eleventh Amendment.

### 26 **FOURTH DEFENSE**

27 To the extent that Plaintiff Zeleny alleges a violation of the California Constitution (Second  
 28 Amended Complaint, ¶¶ 225-229), such claim is barred because a federal court may not grant

1 relief against a state official on the basis of state law. *Pennhurst State Sch. & Hosp. v.*  
2 *Halderman*, 465 U.S. 89 (1984).

3 **FIFTH DEFENSE**

4 Defendant Becerra has insufficient knowledge on which to form a belief as to whether he  
5 may have additional, as yet unstated, defenses available. Defendant Becerra reserves the right to  
6 assert additional defenses in the event that discovery indicates such additional defenses are  
7 proper.

8 **PRAYER FOR RELIEF**

9 **WHEREFORE**, Defendant Becerra prays for judgment as follows:

- 10 1. Plaintiff Zeleny take nothing from Defendant Becerra by way of this action;  
11 2. Plaintiff Zeleny's Second Amended Complaint be dismissed with prejudice, and  
12 judgment entered in favor of Defendant Becerra;  
13 3. Defendant Becerra be awarded costs of suit, and any other relief which the Court  
14 deems proper.

15 Dated: September 10, 2019

Respectfully submitted,

17 XAVIER BECERRA  
Attorney General of California  
18 ANTHONY R. HAKL  
Supervising Deputy Attorney General

19  
20  
21 /s/ Noreen P. Skelly  
NOREEN P. SKELLY  
Deputy Attorney General  
22 *Attorneys for Defendant Attorney General*  
23 *Xavier Becerra*

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## CERTIFICATE OF SERVICE

Case Name: **Zeleny, Michael v. Edmund G. Brown, et al.** No. **3:17-cv-07357 RS (NC)**

---

I hereby certify that on September 10, 2019, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**DEFENDANT ATTORNEY GENERAL XAVIER BECERRA'S ANSWER TO  
PLAINTIFF MICHAEL ZELENY'S SECOND AMENDED COMPLAINT**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 10, 2019, at Sacramento, California.

---

Eileen A. Ennis  
Declarant

---

*/s/ Eileen A. Ennis*  
Signature

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# **EXHIBIT 3**

**AFFELD GRIVAKES LLP**

2049 Century Park East, Suite 2460

Los Angeles, California 90067

Tel: (310) 979-8700

Fax: (310) 979-8701

August 26, 2020

The Honorable Thomas S. Hixson  
United States Magistrate Judge  
San Francisco Courthouse, Courtroom G  
450 Golden Gate Avenue,  
San Francisco, CA 94102

*Via CM/ECF*

Re: ***Michael Zeleny v. Gavin Newsom, et al.***  
**Case No. CV 17-7357 JCS**  
**Joint Letter Brief Regarding Attorney General Xavier Becerra's Responses**  
**to Interrogatories**

Dear Judge Hixson:

Plaintiff Michael Zeleny ("Zeleny") and Defendant Xavier Becerra ("Becerra") respectfully submit this Letter Brief pursuant to your Discovery Standing Order ¶ 2.

Zeleny and Becerra have reached an impasse regarding whether Becerra is obligated to answer Zeleny's Interrogatories Nos. 10-16 and 22-25, which ask Becerra to provide his and the State's interpretation of the meaning of the term "authorized participant" as used in California Penal Code §§ 26375 and 26405(r), including any process for becoming or qualifying as one.

The parties' respective positions are set forth in this Letter Brief. A Declaration of Counsel is submitted concurrently, attaching pertinent excerpts of the Interrogatories and responses, relevant correspondence among counsel, and several other pertinent exhibits.

*[Continued on Next Page]*



## **Plaintiff's Position**

### **A. Introduction**

This case involves, in part, a challenge to California's "open carry ban," which prohibits ordinary Californians from carrying a firearm almost anywhere in California. The State of California (the "State") refused to produce a witness who could take an official position on the meaning of the "open carry ban," including the exceptions thereto. The parties submitted that dispute to the Court for resolution. ECF No. 127.

On June 9, 2020, the Court ruled that "... a 30(b)(6) deposition is not an appropriate vehicle for taking discovery into legal contentions." Ex. 1 (ECF No. 132), 4:1-16. The Court instructed that such "contention discovery" *should rather* be taken through interrogatories ("rogs") and requests for admission. *Id.* at 4:16-20.

The Court identified and discussed such rogs propounded by Zeleny and found that Becerra's responses were incomplete. *Id.* at 2:1-12 ("In interrogatory . . . 10 [Zeleny] asked the AG if 'authorized participant' means someone authorized by a governmental body or agency. The AG's response did not answer the question"; noting that the AG "did not cleanly answer" whether a person with an Entertainment Firearm's permit "is an 'authorized participant'.") Zeleny immediately asked Becerra to answer the rogs. Ex. 2. Becerra refused. Ex. 3.

As the Court has observed, "[i]n his answer [Becerra] specifically denies that Zeleny is entitled to a declaration adopting his preferred interpretation of the 'authorized participant' exception." Ex. 1 at 1:25-28. The State cannot reject Zeleny's interpretation of the statute while also refusing to take a position on what the statute means.

### **B. Background**

#### **1. Zeleny's Challenge to the Open Carry Ban.**

Zeleny challenges California's "open carry ban," which prohibits openly carrying unloaded handguns or long guns in any city or incorporated city and county. There are exceptions to the open carry ban. One, permits open carry by an "authorized participant in . . . a motion picture, television or video production, or entertainment event[.]" Cal. Pen. Code §§ 26375, 26405(r). The definition of an "authorized participant" and who does the authorizing is not in the statute. Ex. 1 at 1. There are no regulations and no official opinions on the subject.

This exception ties together Zeleny's Second Amendment claim against the State and his claims against the City of Menlo Park (the "City"). The City claims that an "authorized participant" must have a City film or event permit. Zeleny disputes this interpretation and further challenges the Constitutionality of the ban. Ex. 1 at 1:21-24, *citing* the Second Amended Complaint.

#### **2. The Parties' Respective Roles.**

Zeleny sued Becerra *in his official capacity*, under *Ex Parte Young*. In denying Becerra's Motion to Dismiss, the Court found that Zeleny had properly stated a constitutional challenge under *Ex Parte Young*. Ex. 6 (ECF No. 37) at 4:25-5:11. Thus, this suit is not "against [Becerra] but . . . against [his] office," and is "no different from a suit against the State itself." *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71 (1989); *see also Wilvox v. Batiste*, 360 F. Supp. 3d 1112, 1119 (E.D. Wash. 2018). The State is a party here.

Becerra's interpretation of the Penal Code sections at hand—in *his role as a State Attorney General*—is both factually relevant and causally related to the injury that Zeleny seeks to redress through this lawsuit. An interpretation by Becerra that is contrary to Zeleny's will likely lead to Zeleny's arrest if he resumes his protests. Thus, a claim for injunctive relief precluding such an interpretation is grounded in fact and properly directed at Becerra. *See* Ex. 6 at 3:19-4:11.

**3. Attorney General Becerra Provides Evasive Interrogatory Answers, Sidestepping the Question of what “Authorized Participant” Means.**

On January 25, 2019, Zeleny propounded interrogatories to Becerra directed at understanding the meaning and application to Zeleny of the term “authorized participant.” *See* Ex. 4, rogs nos. 10-16.

In his responses, Becerra suggested that the phrase might refer to someone with a state-issued Entertainment Firearm’s Permit but refused to give further information. *See* Ex. 4 at 24:14-25:15. Becerra gave similarly evasive responses to rogs nos. 12-16, which similarly sought information about how one can become an “authorized participant.”

On February 12, 2020, Zeleny propounded further interrogatories asking whether an individual with an “entertainment firearms permit” issued pursuant to Penal Code § 29500 is an “authorized participant.” Ex. 5, p. 3. Becerra gave an evasive response to the effect “that it is possible to infer” this definition, but refused to clearly answer. *Id.* at p. 4-5.

**C. Argument**

The meaning of the phrase “authorized participant,” and, specifically, who may legally bestow such an “authorization,” is central to this case. There is no reasonable argument to the contrary.

The responsibility to interpret the term “authorized participant” falls on Becerra as the state’s chief law enforcement officer, who is required to know whether a crime is being committed or an exception applies. *See* Cal. Const., Art. V § 13 (“It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced”).

While the parties may dispute what the statute means as a legal matter, Becerra’s understanding as the chief law enforcement officer of the State is a fact. And Zeleny is entitled to learn that fact in discovery so he can proceed accordingly in this case and with his protests.

**1. The Interrogatories Are Directly Relevant**

There is no dispute that the interrogatories seek relevant information in this case. They seek the interpretation of the proper State official as to the meaning of state criminal statutes applied to Zeleny. As the Court recognized in its prior discovery order, contention interrogatories are the proper method of getting this information. *See* Ex. 1 at 4.

**2. Becerra’s Claim that Interrogatories Seek Pure Legal Conclusions Is Unsupported.**

Becerra claims that “the interrogatories ... do not seek to determine ‘how the authorized participant exception applies to Zeleny[]’ ... because there is no allegation in the complaint that the Attorney General has applied the law to Zeleny in any way, or is involved in his dispute with the other defendants.” Ex. 3 at p. 1.

This is the same argument that the Court considered and rejected at the motion to dismiss stage. *See* Ex. 6 at 3:9-4:11. The “other defendants” in this case enforce the criminal laws, including the “open carry” ban, pursuant to a delegation from the State. *See* Cal. Const., Art. 5, § 13 (“The Attorney General shall have direct supervision over ... such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices”); *see also* Cal. Gov. Code § 12550. Accordingly, Courts have repeatedly rejected the argument by the AG’s office that the AG has “no connection” to the prosecution of the individual plaintiff. *Nichols v. Brown*, 945 F. Supp. 2d 1079, 1106-07 (C.D. Cal. 2013); *see also* *Duncan v. Becerra*, 265 F. Supp. 3d 1216 (noting that Becerra “has not indicated that [firearms statutes] will not be enforced”).

**b. Becerra Relies on Inapposite Legal Authority.**

In refusing to answer the rogs, Becerra now relies on cases generally precluding a party from requiring another to provide a purely legal opinion or interpretation, “entirely divorced from the factual context.” Ex. 3 at p. 1-2. Those cases are inapplicable here.

As an initial matter, Becerra did not object to Interrogatories Nos. 10-16 on this basis. That objection has been waived. *See* Fed. R. Civ. P. 33(b)(4) (“The grounds for objecting to an interrogatory must be stated with specificity. Any ground **not stated in a timely objection** is waived unless the court, for good causes, excuses the failure.”).

Moreover, the decisions Becerra cites are off base. None involved rogs to a government official whose duty is to interpret statutes, seeking his interpretation of a state statute directly applicable to the plaintiff. Becerra’s interpretation—whether right or wrong—is a directly relevant fact. If he interprets the statutes in the same manner as Zeleny, this interpretation itself will support Zeleny’s claims against the City, and preclude the City from enforcing the statutes against Zeleny.

Finally, courts distinguish “contention interrogatories” of the type at issue here from interrogatories asking for analysis of “pure law.” *See Salazar v. Continental Constr. Co.*, 2012 WL 1438892, at \*1 (D. Mt. Apr. 25, 2012) (compelling response to interrogatory asking plaintiff to “identify what OSHA regulations he claims were violated”). These types of interrogatories properly serve to narrow and frame the issues. *See Black Mountain Equities, Inc. v. Players Network, Inc.*, 2020 WL 2097600 (S.D. Cal. May 1, 2020) (compelling answer to interrogatory asking for “all statutes, rules or regulations” that prevented SEC registration).

**D. Conclusion**

Based on the foregoing, Zeleny respectfully asks the Court to require Becerra to serve complete answers to rogs nos. 10-16 and 22-25.

**Defendant California Attorney General Xavier Becerra’s Position**

**I. INTRODUCTION**

Plaintiff Michael Zeleny alleges a conspiracy among the City of Menlo Park and its officials to deny him certain constitutional rights. Zeleny does not allege that California Attorney General Xavier Becerra has participated in this conspiracy, applied the law to Zeleny in any way, or done anything else wrong. The Attorney General is a defendant only because Zeleny asserts a facial challenge to the constitutionality of certain sections of the California Penal Code that prohibit the open carry of weapons. *See* Second Am. Compl., ¶¶ 104-09, 187-193, 225-29.

Through written discovery, Zeleny has sought the Attorney General’s “official interpretation” of California Penal Code sections 26375 and 26405(r), which contain an exception to the general prohibition on open carrying of weapons for “authorized participant[s] in . . . a motion picture, television or video production, or entertainment event[.]”

The Court already denied Zeleny’s request to obtain the same legal interpretation from the Attorney General in the context of a live deposition. *See* Dkt. 132. The same reasoning applies to Zeleny’s request for a legal interpretation via written discovery. Discovery may be sought about facts, or about the application of law to facts, but not about pure questions of law. In this facial constitutional challenge, the meaning of the California Penal Code will involve statutory interpretation divorced from the facts of the case. Zeleny and the Attorney General will have equal access to relevant legislative history and other legal resources, and the Court will determine whether Zeleny is entitled to the judgment that he seeks. Discovery about the Attorney General’s legal theories is not permitted and will improperly infringe on the Attorney General’s mental impression work product.

## II. IN THIS FACIAL CONSTITUTIONAL CHALLENGE, DISCOVERY ABOUT THE ATTORNEY GENERAL'S LEGAL THEORIES SHOULD NOT BE ALLOWED

Zeleny alleges that whether he is allowed to openly carry firearms in his protests under the current statutory framework, and whether the City of Menlo Park has any discretion to prohibit him from doing so, depends on the phrase ‘authorized participant’ in Penal Code §§ 26375 and 26405(r). As part of his facial challenge against the Attorney General, he seeks discovery about the Attorney General’s legal opinion (which he calls an “official interpretation”) of the statutory phrase “authorized participant.” Because there is no allegation that the Attorney General has had anything to do with the alleged conspiracy described in the complaint, as to the Attorney General, Zeleny seeks only a pure legal interpretation untethered from the facts of the case.

Such a pure legal interpretation is not the proper subject of written discovery.

Interrogatories that seek pure legal conclusions untethered from the facts of the case are improper. “Rule 33 does not permit interrogatories directed to issues of ‘pure law’—i.e., abstract legal issues not dependent on the facts of the case.” Phillips & Stevenson, Rutter Group Practice Guide: Fed. Civ. Pro. Before Trial ¶ 11:1680 (The Rutter Group April 2020 Update); see *United States ex rel. Englund v. L.A. Cnty.*, 235 F.R.D. 675, 683 (E.D. Cal. 2006) (barring interrogatory seeking legal interpretation of statutory term); *Everest Nat’l Ins. Co. v. Santa Cruz Cnty. Bank*, No. 15CV02085BLFHRL, 2016 WL 6311876, at \*4 (N.D. Cal. Oct. 28, 2016) (barring interrogatories seeking information about “abstract legal definitions or discussions entirely divorced from the factual context of this case”); cf. *Disability Rights Council v. Wash. Metro. Area*, 234 F.R.D. 1, 3 (D.D.C. 2006) (prohibiting requests for admission about specific terms in federal law).

In the Court’s order denying a further 30(b)(6) deposition of the Department of Justice and a personal deposition of Attorney General Becerra, the Court referred to the role of contention interrogatories in determining how a party applies the law to a specific set of facts, e.g., “how the authorized participant exception applies to Zeleny.” See June 9 Order at 4. A contention interrogatory is permissible, while an interrogatory seeking a legal conclusion is not.

Here, the relevant interrogatories do not seek to determine “how the authorized participant exception applies to Zeleny.” They seek a legal opinion about the term “authorized participant.” See Interrogatories 10-16, 22-25. There is no allegation in the complaint that the Attorney General has applied the law to Zeleny in any way, or is involved in his dispute with the other defendants. The Attorney General is named as a defendant only because the complaint asserts a facial challenge to certain provisions of the California Penal Code. Because Zeleny does not allege that the Attorney General has applied any of these statutes against him, Zeleny’s facial claims against the Attorney General will involve pure issues of law. It will not involve any issues of fact, or issues of law applied to fact.

Because Zeleny’s dispute with the Attorney General involves only issues of “pure law”—the facial constitutionality of sections in the Penal Code—the Attorney General is not required to give Zeleny an advance copy of his attorney work product, which is effectively what these interrogatories seek.

## III. ZELENY’S ARGUMENTS TO THE CONTRARY ARE UNPERSUASIVE

Zeleny argues that, despite the general rule prohibiting discovery of legal interpretations, the Attorney General can be compelled to provide his legal interpretation of a statute because the Attorney General is the State’s “chief law enforcement officer.” But Zeleny cites no authority for this purported exception to the general rule that litigants cannot be compelled to provide legal interpretations in discovery. Like any other civil litigant, the Attorney General is entitled to be protected against having to disclose his mental impression work production in discovery. Indeed, that concern is heightened here, where it is undisputed that the Attorney General has not



applied the statute against Zeleny, or relied on the meaning of “authorized participant” in any way that would harm Zeleny. As to the Attorney General, this is a quintessential purely legal challenge to the facial constitutionality of a state statute.

Similarly, Zeleny suggests that such discovery against the Attorney General is proper because the Attorney General allegedly has some degree of authority over the City of Menlo Park, which Zeleny alleges “enforce the criminal laws . . . pursuant to a delegation from the State.” Zeleny also relies to the Court’s earlier ruling on a motion to dismiss. But the Court’s determination that the Attorney General is a proper defendant to defend a facial constitutional challenge to a state criminal statute does not mean that every action of every city in California can be imputed to the Attorney General, such that the Attorney General can be deemed to have “applied” the law to every individual who alleges that they have been harmed by a local government in California. Zeleny does not allege that the Attorney General, or anyone in the State, has taken any action against him, either directly or in concert with the City of Menlo Park. To the extent that the Attorney General has some degree of authority over local law enforcement activities, that does not equate to direct responsibility over—or knowledge of—the decisions of local agencies to allow or disallow First Amendment activities in each of California’s hundreds of cities.

Nor is there any truth to Zeleny’s suggestion that “[a]n interpretation by Becerra that is contrary to Zeleny’s will likely lead to Zeleny’s arrest if he resumes his protests.” The Court, not the Attorney General, will determine whether Zeleny is an “authorized participant” that must be allowed to carry weapons as part of his protests in Menlo Park. Zeleny, Menlo Park, and the Attorney General will present their legal arguments to the Court, which will make a decision that will govern Zeleny’s and Menlo Park’s future conduct.

Finally, Zeleny cites other authorities in support of his argument that the relevant interrogatories are actually contention interrogatories, not requests for a legal interpretation. But in both *Salazar* and *Black Mountain Equities*, the interrogatories simply asked the party to identify what regulations might apply. They did not ask the parties what those authorities meant, or how they should be interpreted. By contrast, here Zeleny seeks a legal interpretation of the term “authorized participant.” Such a request is not permissible. *See United States ex rel. Englund v. L.A. Cnty.*, 235 F.R.D. 675, 683 (E.D. Cal. 2006) (barring interrogatory seeking legal interpretation of statutory term).

Respectfully submitted,

s/ David Markevitch

David Markevitch

Affeld Grivakes LLP

Attorneys for Plaintiff Michael Zeleny

s/ John W. Killeen

John W. Killeen

Deputy Attorney General

Attorneys for California Attorney General  
Xavier Becerra

Hon. Thomas S. Hixson

August 26, 2020

Page 7 of 8

Attestation per Local Rule 5-1:

I attest that each person whose electronic signature appears above has concurred in the electronic filing of this joint document and has authorized the use of their electronic signatures. Records supporting this concurrence are maintained by the filer and are available for inspection if needed.

Dated: August 26, 2020

s/ David Markevitch

David Markevitch

**CERTIFICATE OF SERVICE**

I, David Markevitch, hereby certify that I electronically filed the foregoing document using the Court's CM/ECF system on August 26, 2020. I am informed and believe that electronic filing using the CM/ECF results in electronic service on all interested parties.

Dated: August 26, 2020

s/ David Markevitch

David Markevitch



1 David W. Affeld, State Bar No. 123922  
Damion Robinson, State Bar No. 262573  
2 David Markevitch, State Bar No. 256163  
Affeld Grivakes LLP  
3 2049 Century Park East, Ste. 2460  
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4 Telephone: (310) 979-8700

5 Attorneys for Plaintiff Michael Zeleny  
6  
7  
8

9 **UNITED STATES DISTRICT COURT**  
10 **NORTHERN DISTRICT OF CALIFORNIA**

11 MICHAEL ZELENY,

12 Plaintiff,

13 vs.

14 GAVIN NEWSOM, *et al.*,

15 Defendants.  
16  
17  
18

Case No. CV 17-7357 JCS

Assigned to:

The Honorable Richard G. Seeborg

Discovery Matters:

The Honorable Thomas S. Hixson

**DECLARATION OF COUNSEL**

Action Filed: December 28, 2017

Trial Date: TBD  
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1 I, David Markevitch, declare:

2 1. I, as counsel at Affeld Grivakes LLP, am counsel of record to plaintiff Michael  
3 Zeleny ("Plaintiff") in this matter. I have personal knowledge of the facts below and could  
4 testify competently to those facts if called upon to do so. I submit this declaration concurrently  
5 with a Joint Letter Brief Regarding Interrogatories Propounded to State of California and  
6 Attorney General Xavier Becerra.

7 2. A true copy of Discovery Order entered on June 9, 2020 in this case, ECF No.  
8 132, is attached as **Exhibit 1**.

9 3. A true copy of correspondence dated June 10, 2020 from Damion Robinson,  
10 counsel for Plaintiff, to John Killeen, counsel for Defendant Attorney General Xavier Becerra, is  
11 attached as **Exhibit 2**.

12 4. A true copy of correspondence dated June 26, 2020 from John Killeen, counsel for  
13 Defendant Attorney General Xavier Becerra, to Damion Robinson, counsel for Plaintiff, is  
14 attached as **Exhibit 3**.

15 5. A true copy of Defendant Attorney General Xavier Becerra's Responses to  
16 Plaintiff Michael Zeleny's First Set of Interrogatories is attached as **Exhibit 4**.

17 6. A true copy of Defendant Attorney General Xavier Becerra's Responses to  
18 Plaintiff Michael Zeleny's Interrogatories, Set Two is attached as **Exhibit 5**.

19 7. A true copy of Order Granting in Part and Denying in Part Motion to Dismiss  
20 entered on April 17, 2018 in this case, ECF No. 37, is attached as **Exhibit 6**.

21 I declare under penalty of perjury under the laws of the United States of America that the  
22 foregoing is true and correct.

23 Executed on this 26th day of August 2020.

24 s/ David Markevitch

David Markevitch

**PROOF OF SERVICE**

I hereby certify that on August 26, 2020, I electronically filed the foregoing document using the Court's CM/ECF system. I am informed and believe that the CM/ECF system will send a notice of electronic filing to the interested parties.

Dated: August 26, 2020

s/ David Markevitch  
David Markevitch

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL ZELENY,  
Plaintiff,

v.

GAVIN NEWSOM, et al.,  
Defendants.

Case No. 17-cv-07357-RS (TSH)

**DISCOVERY ORDER**

Re: Dkt. No. 127

Plaintiff Michael Zeleny wants to carry unloaded firearms during his public protests. California generally bans “open carry,” but there is an exception for an “authorized participant in . . . a motion picture, television or video production, or entertainment event[.]” Cal. Penal Code § 26375; *see also id.* § 26405(r). Unhelpfully, there is no statutory definition of an “authorized participant,” nor a provision stating who does the authorizing. There are no governing regulations either. The City of Menlo Park takes the position that an “authorized participant” must have a City film or event permit. Zeleny disagrees. So, what we have here is a disagreement about a matter of statutory interpretation.

But there is an additional layer, because if the Court rejects Zeleny’s interpretation of this statutory exception (which he seeks in paragraph B of his prayer for relief, *see* ECF No. 99 (Second Amended Complaint)), he wants the open carry laws struck down (which he seeks in paragraph A of the prayer for relief, *see id.*) The California Attorney General (“AG”) has been named as a defendant in this case, and he seeks to defend the state’s open carry laws. In his answer the AG also specifically denies that Zeleny is entitled to a declaration adopting his preferred interpretation of the “authorized participant” exception. ECF No. 100, prayer for relief B.

1 Zeleny has been trying to take discovery into the AG's interpretation of the "authorized  
2 participant" exception. In interrogatory ("rog") 10 he asked the AG if "authorized participant"  
3 means someone authorized by a governmental body or agency. The AG's response did not answer  
4 the question. In rog 22 he asked if someone who has a valid entertainment firearms permit under  
5 Penal Code section 29500 is an "authorized participant." The AG's response did not cleanly  
6 answer that question either, although it came closer.

7 Zeleny then served a Rule 30(b)(6) deposition notice on the AG concerning 20 topics  
8 about the meaning of the state's open and concealed carry laws and their exceptions, including the  
9 "authorized participant" exception. The AG put Blake Graham up as the deponent. When  
10 Zeleny's counsel asked the witness about the meaning of the "authorized participant" exception,  
11 the AG objected that the witness wasn't authorized to interpret a statute, and the witness refused to  
12 give a substantive answer. We are now here on Zeleny's motion to compel. ECF No. 127. He  
13 seeks an order compelling the state to produce a Rule 30(b)(6) witness who will answer his  
14 questions about the meaning of the open carry laws, or in the alternative, to produce AG Xavier  
15 Becerra himself for a deposition.

16 Although the gist of Zeleny's motion is clear enough, as an analytical matter it lacks  
17 precision because he doesn't identify which 30(b)(6) topics he is moving on. He doesn't seem to  
18 be moving on topics 1-5, which concern California's *concealed* carry laws. Likewise, his motion  
19 doesn't seem to cover topics 18-20, which deal with discovery responses and documents  
20 produced. He is definitely moving on topic 13 ("The interpretation of the Open Carry Statutes").  
21 The Court supposes he is moving on topics 6-12 only to the extent that the AG thinks those issues  
22 bear on the interpretation of the open carry laws, and the same is probably true of topics 14-17.  
23 Accordingly, the Court construes this motion as being directed to topic 13, including whatever  
24 tools of statutory interpretation (such as legislative history, post-enactment enforcement,  
25 constitutional avoidance, and so on) the AG believes are relevant to topic 13.

26 The AG opposes the motion, arguing that while discovery into facts or the application of  
27 law to fact is allowed, Zeleny is trying to take discovery into pure issues of law. The AG also  
28 asserts that deposing Becerra personally is unwarranted under the apex doctrine.

There are essentially three problems with this motion as it relates to the 30(b)(6) notice. The first is that “the interpretation of the open carry statutes” is too sweeping a topic for a witness to testify to. The ban on openly carrying an unloaded handgun itself has numerous subparts, *see* Cal. Penal Code § 26350, and could easily generate many law review articles interpreting it. And then there are 33 exceptions to the ban. Cal. Penal Code §§ 26361-26392. Zeleny’s motion seems to demand a 30(b)(6) witness who can testify about the entirety of that statute and all of its exceptions. ECF No. 127 at 2 (criticizing the state for “refus[ing] to produce any witness who can take an official position on the meaning of the ‘open carry ban,’ including the exceptions thereto.”). However, Rule 30(b)(6) requires a deposition notice to an entity to “describe with reasonable particularity the matters for examination,” and topic 13 fails that requirement.

Second, the vast majority of what is covered by “the interpretation of the open carry statutes” is irrelevant to this case. There is no suggestion in the Second Amended Complaint that Zeleny wants to carry an unloaded handgun in a target range (Cal. Penal Code § 26377) or in an official parade (*id.* § 26368) or in a pawn shop (*id.* § 26374) or to train a dog to hunt (*id.* § 26366.5). In his motion, Zeleny emphasizes the importance to this lawsuit of the “authorized participant” exception. However, none of the 20 topics in the deposition notice are limited to the “authorized participant” exception, and certainly none are limited to or even cover whether Zeleny is an authorized participant, and if not, what authorization he needs. Indeed, once you put aside topics 9, 10 and 18-20, none of the topics have anything to do with the facts of this case. The topics seem to contemplate a witness who will give answers in the form of long, abstract essays about the meaning and interpretation of every provision of the open carry laws. There is too big of a disconnect between the relevant question of what Zeleny needs to do to become an “authorized participant,” if he is not one already, and the topics in this deposition notice. Indeed, the case-specific subject of how the “authorized participant” exception *applies to Zeleny* is not even embraced in the notice.

But let’s suppose the Court fixes the first two problems, such as by narrowing topic 13 to the meaning of the “authorized participant” exception, or by completely rewriting the deposition notice and turning this into a deposition about how the “authorized participant” exception applies

1 to Zeleny. We then run into the third problem, which is that a 30(b)(6) deposition is not an  
2 appropriate vehicle for taking discovery into legal contentions. *See Lenz v. Universal Music*  
3 *Corp.*, 2010 WL 1610074, at \*3 (N.D. Cal. April 20, 2010) (questions about legal contentions are  
4 “an improper topic for a Rule 30(b)(6) deposition”); *3M Co. v. Kanbar*, 2007 WL 1794936, at \*2  
5 (N.D. Cal. June 19, 2007) (topics “seeking legal conclusions . . . should not form the basis for  
6 30(b)(6) deposition topics”). Rule 30(b)(6) has many great uses. It’s helpful for a litigant who  
7 knows what he wants to depose an entity about but hasn’t the faintest idea who possesses the right  
8 knowledge. It’s helpful to force an entity to aggregate information known to multiple people, so  
9 the deposing party can learn the information in one deposition rather than ten. But Zeleny isn’t  
10 using this deposition to obtain factual information, and oral testimony in which the witness has to  
11 answer questions on the spot about a party’s legal contentions is an improper use of a deposition.  
12 The purpose of contention discovery is to bind your opponent to a position, but ““a Rule 30(b)(6)  
13 deponent’s . . . legal conclusions do not bind the entity.”” *Snapp v. United Transp. Union*, 889  
14 F.3d 1088, 1104 (9th Cir. 2018) (quoting 7 James Wm. Moore, et al., *Moore’s Federal Practice* §  
15 30.25[3] (3d ed. 2016)), *cert. denied sub nom. Snapp v. Burlington Northern Santa Fe Ry. Co.*,  
16 139 S. Ct. 817 (2019). Rather, Rules 33 and 36 expressly contemplate that rogs and RFAs will be  
17 used to take contention discovery. *See* Fed. R. Civ. Proc. 33(a)(2) (“An interrogatory is not  
18 objectionable merely because it asks for an opinion or contention that relates to fact or the  
19 application of law to fact”); Fed. R. Civ. P. 36(a)(1)(A) (requests for admission may relate to  
20 “facts, the application of law to fact, or opinions about either”).

21 Accordingly, the Court denies Zeleny’s motion to compel the AG to produce a Rule  
22 30(b)(6) deponent on the interpretation of the open carry laws. The Court also denies Zeleny’s  
23 alternative request to depose Becerra. “Heads of government agencies are not normally subject to  
24 deposition,” *Kyle Engineering Co. v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979). “In determining  
25 whether to allow an apex deposition, courts consider (1) whether the deponent has unique first-  
26 hand, non-repetitive knowledge of the facts at issue in the case and (2) whether the party seeking  
27 the deposition has exhausted other less intrusive discovery methods.” *Apple Inc. v. Samsung*  
28 *Electronics, Ltd.*, 282 F.R.D. 259, 263 (N.D. Cal. 2012). As for the first prong, if Becerra knows



1 anything about the facts of this case, it would only be because an aide briefed him; he is named as  
2 a defendant only because, under *Ex parte Young*, 209 U.S. 123 (1908), that is the procedure for  
3 challenging the constitutionality of a state law that is enforced by the AG. As for the second  
4 prong, any relevant factual discovery would come from the City of Menlo Park. There is no basis  
5 to depose Becerra here.

6 **IT IS SO ORDERED.**

7  
8 Dated: June 9, 2020

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11 THOMAS S. HIXSON  
12 United States Magistrate Judge  
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United States District Court  
Northern District of California

## AFFELD GRIVAKES LLP

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June 10, 2020

John W. Killeen, Deputy Attorney General  
Government Law Section  
California Department of Justice, Office of  
the Attorney General  
1300 I Street, Suite 125  
P.O. Box. 944255  
Sacramento, CA 94244-2550

*Via Email*

Re: *Zeleny v. Newsom, et al.*, N.D. Cal. Case No. 17-7357  
Responses to Interrogatories

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Dear John:

In light of the Court's ruling this afternoon, we would ask that Attorney General Becerra revisit and revise his responses to our interrogatories seeking an interpretation of the "authorized participant" exception. As Judge Hixson explained, interrogatories are a proper tool to determine a party's legal contentions. Order at p. 4. He also determined that the Attorney General has not properly answered contention interrogatories going to the exception:

Zeleny has been trying to take discovery into the AG's interpretation of the "authorized participant" exception. In interrogatory ("rog") 10 he asked the AG if "authorized participant" means someone authorized by a governmental body or agency. The AG's response did not answer the question. In rog 22 he asked if someone who has a valid entertainment firearms permit under Penal Code section 29500 is an "authorized participant." The AG's response did not cleanly answer that question either, although it came closer. (Order at p. 2)

The Order is clear that these interrogatories are appropriate and that the answers given are not.

Based on the Order, substantive answers are required to the following interrogatories:

**Interrogatory No. 10:** Does the phrase 'authorized participant' as used in California Penal Code §§ 26375 and 26405(r) refer to a participant authorized by a governmental body or agency?

Noreen Skelly, Esq.

February 12, 2020

Page 2 of 2

**Interrogatory No. 11:** If Your answer to Interrogatory No. 10 is in the affirmative, identify the governmental bodies or agencies from which authorization is required?

**Interrogatory No. 12:** If Your answer to Interrogatory No. 10 is in the affirmative, state all bases for your contention that the phrase ‘authorized participant,’ as used in California Penal Code §§ 26375 and 26405(r), refers to a participant authorized by a governmental body or agency.

**Interrogatory No. 13:** If your answer to Interrogatory No. 10 is in the negative, state the persons or entities [*i.e.*, other than governmental agencies] whose authorization is required in order for California Penal Code §§ 26375 and 26405(r) to exempt the carrying of firearms from California Penal Code §§ 26350 and 26405.

**Interrogatory No. 14:** Do California Penal Codes §§ 26375 and 26405(r) require that the “motion picture, television or video production” or “entertainment event” itself be authorized in order to exempt participants from California Penal Code §§ 26350 and 26405?

**Interrogatory No. 15:** If your response to Interrogatory No. 14 is in the affirmative, identify all persons or entities whose authorization of the “motion picture, television or video production” or “entertainment event” is required in order to exempt participants from California Penal Code §§ 26350 and 26405.

**Interrogatory No. 16:** State all of the bases for Your response to Interrogatory No. 14.

**Interrogatory No. 21:** Identify the types of events that qualify as “entertainment events” under California Penal Code §§ 26375, 26405(r), and 25510.

**Interrogatory No. 22:** Is an individual who has a valid “entertainment firearms permit” issued pursuant to Penal Code § 29500 an “authorized participant” within the meaning of penal Code §§ 26375 and 26405(r)?

**Interrogatory No. 23:** State all facts supporting your response to the preceding interrogatory.

**Interrogatory No. 24:** State all facts supporting your contention that the definition of “authorized participant” under Penal Code §§ 26375 and 26405(r) refers to a person with an “entertainment firearms permit” issued pursuant to Penal Code § 29500.

**Interrogatory No. 25:** Identify all documents supporting your contention that the definition of “authorized participant” under Penal Code §§ 26375 and 26405(r) refers to a person with an “entertainment firearms permit” issued pursuant to Penal Code § 29500.

All of these interrogatories are of the type that Judge Hixson mentioned in his Order. The Attorney General’s answers are either “N/A” or are in the form that the Court found insufficient.

We simply need to know the Attorney General’s interpretation of the statute before summary judgment briefing and trial – *i.e.*, how the Attorney General interprets “authorized participant” and why. Please let us know if you are willing to revise the responses consistent with the Court’s Order today without further motion practice. If you would like to discuss this further, please feel free to call or email.

Sincerely,  
s/ Damion Robinson  
Damion Robinson

cc: Todd H. Master, Esq.



**XAVIER BECERRA**  
**Attorney General**

**State of California**  
**DEPARTMENT OF JUSTICE**

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June 26, 2020

***Via Email***

Mr. Damion Robinson  
Mr. David Markevitch  
Affeld Grivakes, LLP  
2049 Century Park East, Suite 2460  
Los Angeles, CA 90067

RE: *Zeleny, Michael v. Gavin Newsom, et al.*  
USDC, Northern District of California, Case No. 3:17-cv-07357 RS

Dear Damion and David:

I am writing in response to your June 10 letter about Interrogatories 10 through 16 and 21 through 25. You seek additional or different answers to these interrogatories on the basis that they are “of the type that Judge Hixon mentioned in his Order.”

In his order denying a further 30(b)(6) deposition of the Department of Justice and a personal deposition of Attorney General Becerra, Judge Hixson referred to the role of contention interrogatories in determining how a party applies the law to a specific set of facts, e.g., “how the authorized participant exception applies to Zeleny.” See June 9 Order at 4.

But the interrogatories you identify do not seek to determine “how the authorized participant exception applies to Zeleny.” The reason they do not is because there is no allegation in the complaint that the Attorney General has applied the law to Zeleny in any way, or is involved in his dispute with the other defendants. The Attorney General is named as a defendant only because the complaint asserts a facial challenge to certain provisions of the California Penal Code. Because Zeleny does not allege that the Attorney General has applied any of these statutes against him, Zeleny’s facial claims against the Attorney General will involve pure issues of law. It will not involve any issues of fact, or issues of law applied to fact.

Interrogatories that seek pure legal conclusions untethered from the facts of the case are improper. “Rule 33 does not permit interrogatories directed to issues of ‘pure law’—i.e., abstract legal issues not dependent on the facts of the case.” Phillips & Stevenson, Rutter Group Practice Guide: Fed. Civ. Pro. Before Trial ¶ 11:1680 (The Rutter Group April 2020 Update); see *United States ex rel. Englund v. L.A. Cnty.*, 235 F.R.D. 675, 683 (E.D. Cal. 2006) (barring interrogatory seeking legal interpretation of statutory term); *Everest Nat’l Ins. Co. v. Santa Cruz Cnty. Bank*,

Damion Robinson  
June 26, 2020  
Page 2

No. 15CV02085BLFHRL, 2016 WL 6311876, at \*4 (N.D. Cal. Oct. 28, 2016) (barring interrogatories seeking information about “abstract legal definitions or discussions entirely divorced from the factual context of this case”); *cf. Disability Rights Council v. Wash. Metro. Area*, 234 F.R.D. 1, 3 (D.D.C. 2006) (prohibiting requests for admission about specific terms in federal law).

Because Zeleny’s dispute with the Attorney General involves only issues of “pure law”—the facial constitutionality of sections in the Penal Code—the Attorney General is not required to give Zeleny an advance copy of his attorney work product, which is effectively what these interrogatories seek.

Please let me know if you would like to discuss this issue further.

Sincerely,



JOHN W. KILLEEN  
Deputy Attorney General

For XAVIER BECERRA  
Attorney General

JWK:EE

XAVIER BECERRA  
Attorney General of California  
ANTHONY R. HAKL  
Supervising Deputy Attorney General  
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E-mail: Noreen.Skelly@doj.ca.gov  
*Attorneys for Defendant Attorney General Xavier  
Becerra*

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

**MICHAEL ZELENY, an individual,**

Plaintiff,

v.

**GAVIN NEWSOM<sup>1</sup>, an individual, in his  
official capacity; XAVIER BECERRA, an  
individual, in his official capacity; CITY OF  
MENLO PARK, a municipal corporation;  
and DAVE BERTINI, in his official  
capacity,**

Defendants.

3:17-cv-07357 RS (NC)

**DEFENDANT ATTORNEY GENERAL  
XAVIER BECERRA'S RESPONSES TO  
PLAINTIFF MICHAEL ZELENY'S  
FIRST SET OF INTERROGATORIES<sup>2</sup>**

PROPOUNDING PARTY: Plaintiff Michael Zeleny

ANSWERING PARTY: Defendant Attorney General Xavier Becerra

SET NUMBER: One

<sup>1</sup> Although Edmund G. Brown, Jr., sued in his official capacity as the Governor of California, has been dismissed from this matter, Defendant Becerra updates the caption to substitute Governor Gavin Newsom for former Governor Edmund G. Brown, Jr., pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure.

<sup>2</sup> Verification to follow.

## PRELIMINARY STATEMENT

For purposes of these interrogatories, Plaintiff Zeleny has used the terms “YOU” and “YOUR” to, “refer to Xavier Becerra as the Attorney General of the State of California. These interrogatories seek the official position of the State of California.” (Plaintiff Zeleny’s Interrogatories, p. 2, lines 22-24.) Defendant Becerra objects to Plaintiff Zeleny’s definition of “YOU” and “YOUR” as encompassing the official position of the State of California. The phrase “the official position of the State of California” is vague and overbroad. The State of California is made up of the Executive, Legislative, and Judicial branches of government, which are separate and co-equal. California’s Executive branch includes a number of elected officials including, but not limited to the Attorney General of California. Moreover, the State of California is not a defendant in this action—nor would it be an appropriate defendant in this action. As a general matter, the proper respondent or defendant in a challenge to a state law or policy is the officer or agency charged with implementing it. See *Serrano v. Priest*, 18 Cal.3d 728, 752 (1976); *State v. Superior Court*, 12 Cal.3d 237, 255 (1974).

Defendant Becerra objects to each interrogatory to the extent that it purports to impose any obligation or requirement greater than or different to the obligations or requirements set forth in the Federal Rules of Civil Procedure and/or the applicable rules and orders of this Court.

Defendant Becerra objects to each interrogatory to the extent that it calls for the disclosure of information protected from disclosure by the attorney work-product doctrine, the attorney-client privilege, the deliberative process privilege and/or any other applicable privilege or protection. Should Defendant Becerra disclose any privileged or otherwise protected information in these responses, the disclosure is inadvertent and does not constitute a waiver of the privilege or protection.

Defendant Becerra has not completed the investigation of the facts and issues relating to Plaintiff Zeleny’s claims and has not completed discovery in this action. All of the answers contained herein are based solely upon information and documents which are presently available to, and specifically known by, Defendant Becerra, and the answers disclose only those contentions which presently occur to Defendant Becerra. Further discovery, independent



1 investigation, legal research and analysis may supply additional facts and may lead to additions,  
2 changes, and variations from the answers herein.

3 The following answers are given without prejudice to the right to produce evidence and/or  
4 witnesses or rely on facts which Defendant Becerra may later discover. Defendant Becerra  
5 accordingly reserves the right to change any and all answers herein as additional facts are  
6 ascertained, witnesses identified and legal research is completed. The answers contained herein  
7 are made in good faith in an attempt to supply as much factual information and as much  
8 specification of legal contention as is presently known, and in no way prejudices Defendant  
9 Becerra in relation to further discovery and proceedings.

10 Defendant Becerra incorporates by reference every general objection set forth above into  
11 each specific answer set forth below. A specific response may repeat a general objection for  
12 emphasis or some other reason. The failure to include a general objection in any specific answer  
13 does not waive any general objection to that interrogatory.

14 **INTERROGATORY NO. 1:** State all facts on which You base Your contention, if any,  
15 that California Penal Code § 26350 is constitutional under the Second Amendment, including any  
16 legitimate goals or public interests intended to be served by that statute.

17 [As used in these interrogatories,

18 (a) “You” and “Your” refer to Xavier Becerra as the Attorney General of the State of  
19 California. These interrogatories seek the official position of the State of California;

20 (b) “Second Amendment” means the Second Amendment to the United States  
21 Constitution].

22 **RESPONSE TO INTERROGATORY NO. 1:**

23 Defendant Becerra incorporates by reference the above-stated general objections as though  
24 fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is  
25 vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to  
26 Plaintiff Zeleny’s claims, and not reasonably calculated to lead to the discovery of information  
27 that is relevant to Plaintiff’s claims. Defendant Becerra also objects to this interrogatory on the  
28 grounds that it seeks Defendant Becerra’s contentions regarding the constitutionality of California

Legislature considered including other forms of “speech or expressive conduct” in enacting Penal Code §§ 26375 and 26405, subdivision (r). Thus, Defendant Becerra is unable to respond to this interrogatory.

**INTERROGATORY NO. 9:** Identify all documents bearing upon, supporting, or reflecting the reasons set forth in Your response to the preceding interrogatory.

**RESPONSE TO INTERROGATORY NO. 9:**

Defendant Becerra incorporates by reference the above-stated general objections as though fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to Plaintiff Zeleny’s claims, and not reasonably calculated to lead to the discovery of information that is relevant to Plaintiff’s claims.

Subject to, and without waiving the foregoing objections, Defendant Becerra responds as follows: N/A.

**INTERROGATORY NO. 10:** Does the phrase “authorized participant” as used in California Penal Code §§ 26375 and 26405(r) refer to a participant authorized by a governmental body or agency?

**RESPONSE TO INTERROGATORY NO. 10:**

Defendant Becerra incorporates by reference the above-stated general objections as though fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is vague and overbroad. Moreover, it seeks information irrelevant to Plaintiff Zeleny’s claims, and not reasonably calculated to lead to the discovery of information that is relevant to Plaintiff’s claims.

Subject to, and without waiving the foregoing objections, Defendant Becerra responds as follows: Penal Code §§ 26375 and 26405, subdivision (r) do not include definitions of the phrase “authorized participant.”

However, according to the Legislative history of Penal Code § 26375, that section permits the use of unloaded handguns as an “entertainment props.” (See DOJ 000219) Additionally, the Entertainment Firearms Permit only authorizes the permit holder “to possess firearms loaned to

the permitholder for use solely as a prop in a motion picture, television, video, theatrical, or other entertainment production or event.” (Penal Code § 29500.) Thus, the exceptions set forth in Penal Code §§ 26375 and 26405, subdivision (r) are available only to those using unloaded firearms loaned to them for use as “entertainment props” in a motion picture, television, video, theatrical, or other entertainment production or event.

**INTERROGATORY NO. 11:** If Your answer to Interrogatory No. 10 is in the affirmative, identify the governmental bodies or agencies from which authorization is required?

**RESPONSE TO INTERROGATORY NO. 11:**

Defendant Becerra incorporates by reference the above-stated general objections as though fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to Plaintiff Zeleny’s claims, and not reasonably calculated to lead to the discovery of information that is relevant to Plaintiff’s claims.

Subject to, and without waiving the foregoing objections, Defendant Becerra responds as follows: N/A.

**INTERROGATORY NO. 12:** If Your answer to Interrogatory No. 10 is in the affirmative, state all bases for your contention that the phrase “authorized participant,” as used in California Penal Code §§ 26375 and 26405(r), refers to a participant authorized by a governmental body or agency?

**RESPONSE TO INTERROGATORY NO. 12:**

Defendant Becerra incorporates by reference the above-stated general objections as though fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to Plaintiff Zeleny’s claims, and not reasonably calculated to lead to the discovery of information that is relevant to Plaintiff’s claims.

Subject to, and without waiving the foregoing objections, Defendant Becerra responds as follows: N/A.

1       **INTERROGATORY NO. 13:** If your answer to Interrogatory No. 10 is in the negative,  
2 state the persons or entities whose authorization is required in order for California Penal Code §§  
3 26375 and 26405(r) to exempt the carrying of firearms from California Penal Code §§ 26350 and  
4 26405.

5       **RESPONSE TO INTERROGATORY NO. 13:**

6       Defendant Becerra incorporates by reference the above-stated general objections as though  
7 fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is  
8 vague and overbroad. Moreover, it seeks information irrelevant to Plaintiff Zeleny's claims, and  
9 not reasonably calculated to lead to the discovery of information that is relevant to Plaintiff's  
10 claims.

11       Subject to, and without waiving the foregoing objections, Defendant Becerra responds as  
12 follows: The Legislature enacted certain exceptions to the general prohibitions on openly carrying  
13 firearms.

14       Penal Code § 26375 provides that section 26350 does not apply to, or affect, the open  
15 carrying of an unloaded handgun by an authorized participant in, or an authorized employee or  
16 agent of a supplier of firearms for, a motion picture, television or video production, or  
17 entertainment event, when the participant lawfully uses the handgun as part of that production or  
18 event, as part of rehearsing or practicing for participation in that production or event, or while the  
19 participant or authorized employee or agent is at that production or event, or rehearsal or practice  
20 for that production or event. (Pen. Code, § 26375.) According to the Legislative history, Penal  
21 Code § 26375 permits the use of unloaded handguns as an "entertainment props." (See DOJ  
22 000219)

23       Likewise, Penal Code § 26405, subdivision (r) provides that Penal Code § 26400 does not  
24 apply to, or affect, the carrying of an unloaded firearm that is not a handgun by an authorized  
25 participant in, or an authorized employee or agent of a supplier of firearms for, a motion picture,  
26 television, or video production or entertainment event, when the participant lawfully uses that  
27 firearm as part of that production or event, as part of rehearsing or practicing for participation in  
28

1 that production or event, or while the participant or authorized employee or agent is at that  
2 production or event, or rehearsal or practice for that production or event.

3 And, Penal Code § 29500 provides that, “Any person who is at least 21 years of age may  
4 apply for an entertainment firearms permit from the Department of Justice. An entertainment  
5 firearms permit authorizes the permit holder to possess firearms loaned to the permitholder for  
6 use solely as a prop in a motion picture, television, video, theatrical, or other entertainment  
7 production or event.” (Added by Stats.2010, c. 711 (S.B. 1080).)

8 **INTERROGATORY NO. 14:** Do California Penal Codes §§ 26375 and 26405(r) require  
9 that the “motion picture, television or video production” or “entertainment event” itself be  
10 authorized in order to exempt participants from California Penal Code §§ 26350 and 26405?

11 **RESPONSE TO INTERROGATORY NO. 14:**

12 Defendant Becerra incorporates by reference the above-stated general objections as though  
13 fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is  
14 vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to  
15 Plaintiff Zeleny’s claims, and not reasonably calculated to lead to the discovery of information  
16 that is relevant to Plaintiff’s claims.

17 Subject to, and without waiving the foregoing objections, Defendant Becerra responds as  
18 follows: Penal Code §§ 26375 and 26405(r) do not address whether the “motion picture,  
19 television or video production” or “entertainment event” itself be authorized in order to exempt  
20 participants from California Penal Code §§ 26350 and 26405. Accordingly, Defendant Becerra is  
21 unable to respond to this interrogatory.

22 **INTERROGATORY NO. 15:** If your response to Interrogatory No. 14 is in the  
23 affirmative, identify all persons or entities whose authorization of the “motion picture, television  
24 or video production” or “entertainment event” is required in order to exempt participants from  
25 California Penal Code §§ 26350 and 26405.

26 **RESPONSE TO INTERROGATORY NO. 15:**

27 Defendant Becerra incorporates by reference the above-stated general objections as though  
28 fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is

1 vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to  
2 Plaintiff Zeleny's claims, and not reasonably calculated to lead to the discovery of information  
3 that is relevant to Plaintiff's claims.

4 Subject to, and without waiving the foregoing objections, Defendant Becerra responds as  
5 follows: N/A.

6 **INTERROGATORY NO. 16:** State all of the bases for Your response to Interrogatory  
7 No. 14.

8 **RESPONSE TO INTERROGATORY NO. 16:**

9 Defendant Becerra incorporates by reference the above-stated general objections as though  
10 fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is  
11 vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to  
12 Plaintiff Zeleny's claims, and not reasonably calculated to lead to the discovery of information  
13 that is relevant to Plaintiff's claims.

14 Subject to, and without waiving the foregoing objections, Defendant Becerra responds as  
15 follows: N/A.

16 **INTERROGATORY NO. 17:** State all facts supporting your interpretation of California  
17 Penal Code §§ 26375 and 26405(r).

18 **RESPONSE TO INTERROGATORY NO. 17:**

19 Defendant Becerra incorporates by reference the above-stated general objections as though  
20 fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is  
21 vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to  
22 Plaintiff Zeleny's claims, and not reasonably calculated to lead to the discovery of information  
23 that is relevant to Plaintiff's claims.

24 Subject to, and without waiving the foregoing objections, Defendant Becerra responds as  
25 follows: Defendant Becerra has not issued an interpretation of California Penal Code §§ 26375  
26 and 26405, subdivision (r). However, the California Department of Justice does possess  
27 documents that are related to firearms generally. See and DOJ 0001282-DOJ 001312.  
28



1 Dated: April 3, 2019

Respectfully submitted,

2  
3 XAVIER BECERRA  
Attorney General of California  
4 ANTHONY R. HAKL  
Supervising Deputy Attorney General

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6 NOREEN P. SKELLY  
7 Deputy Attorney General  
8 *Attorneys for Defendant Attorney General*  
*Xavier Becerra*



**DECLARATION OF SERVICE BY OVERNIGHT COURIER**

Case Name: **Zeleny, Michael v. Edmund G. Brown, et al.**

No.: **3:17-cv-07357 RS (NC)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On April 3, 2019, I served the attached **DEFENDANT ATTORNEY GENERAL XAVIER BECERRA'S RESPONSES TO PLAINTIFF MICHAEL ZELENY'S FIRSTS SET OF INTERROGATORIES** by placing a true copy thereof enclosed in a sealed envelope with the **Golden State Overnight**, addressed as follows:

David William Affeld  
Damion D. D. Robinson  
Affeld Grivakes LLP  
2049 Century Park East, Suite 2460  
Los Angeles, CA 90067  
Tel: (310) 979-8700  
Fax: (310) 979-8701  
Email: [dwa@agzlaw.com](mailto:dwa@agzlaw.com)  
[dr@agzlaw.com](mailto:dr@agzlaw.com)  
*Attorneys for Plaintiff*

Todd H. Master  
Howard Rome Martin & Ridley LLP  
1900 O'Farrell Street, Suite 280  
San Mateo, CA 94403  
Tel: (650) 365-7715  
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Email: [tmaster@hrmrlaw.com](mailto:tmaster@hrmrlaw.com)  
*Attorneys for Defendants City of Menlo Park  
and Dave Bertini*

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 3, 2019, at Sacramento, California.

Eileen A. Ennis  
Declarant

  
Signature

XAVIER BECERRA  
Attorney General of California  
ANTHONY R. HAKL  
Supervising Deputy Attorney General  
NOREEN P. SKELLY  
Deputy Attorney General  
JOHN W. KILLEEN  
Deputy Attorney General  
State Bar No. 258395  
1300 I Street, Suite 125  
P.O. Box 944255  
Sacramento, CA 94244-2550  
Telephone: (916) 210-6045  
Fax: (916) 324-8835  
E-mail: John.Killeen@doj.ca.gov  
*Attorneys for Defendant Attorney General Xavier  
Becerra*

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

**MICHAEL ZELENY, an individual,**

Plaintiff,

v.

**GAVIN NEWSOM, an individual, in his  
official capacity; XAVIER BECERRA, an  
individual, in his official capacity; CITY OF  
MENLO PARK, a municipal corporation;  
and DAVE BERTINI, in his official  
capacity,**

Defendants.

3:17-cv-07357 RS

**DEFENDANT ATTORNEY GENERAL  
XAVIER BECERRA'S RESPONSES TO  
PLAINTIFF MICHAEL ZELENY'S  
INTERROGATORIES, SET TWO**

PROPOUNDING PARTY: Plaintiff Michael Zeleny

ANSWERING PARTY: Defendant Attorney General Xavier Becerra

SET NUMBER: Two

///

///

**PRELIMINARY STATEMENT**

Defendant Becerra objects to each interrogatory to the extent that it purports to impose any obligation or requirement greater than or different to the obligations or requirements set forth in the Federal Rules of Civil Procedure and/or the applicable rules and orders of this Court.

Defendant Becerra objects to each interrogatory to the extent that it calls for the disclosure of information protected from disclosure by the attorney work-product doctrine, the attorney-client privilege, the deliberative process privilege and/or any other applicable privilege or protection. Should Defendant Becerra disclose any privileged or otherwise protected information in these responses, the disclosure is inadvertent and does not constitute a waiver of the privilege or protection.

Defendant Becerra objects to each interrogatory to the extent that it calls for him to interpret what the Legislature intended when it drafted any of the statutory provisions at issue in this case.

Defendant Becerra has not completed the investigation of the facts and issues relating to Plaintiff Zeleny's claims and has not completed discovery in this action. All of the answers contained herein are based solely upon information and documents which are presently available to, and specifically known by, Defendant Becerra, and the answers disclose only those contentions which presently occur to Defendant Becerra. Further discovery, independent investigation, legal research and analysis may supply additional facts and may lead to additions, changes, and variations from the answers herein.

The following answers are given without prejudice to the right to produce evidence and/or witnesses or rely on facts which Defendant Becerra may later discover. Defendant Becerra accordingly reserves the right to change any and all answers herein as additional facts are ascertained, witnesses identified and legal research is completed. The answers contained herein are made in good faith in an attempt to supply as much factual information and as much specification of legal contention as is presently known, and in no way prejudices Defendant Becerra in relation to further discovery and proceedings.

1 Defendant Becerra incorporates by reference every general objection set forth above into  
2 each specific answer set forth below. A specific response may repeat a general objection for  
3 emphasis or some other reason. The failure to include a general objection in any specific answer  
4 does not waive any general objection to that interrogatory.

5 **INTERROGATORY NO. 22:** Is an individual who has a valid “entertainment firearms  
6 permit” issued pursuant to Penal Code § 29500 an “authorized participant” within the meaning of  
7 Penal Code §§ 26375 and 26405(r)?

8 **RESPONSE TO INTERROGATORY NO. 22:**

9 Defendant Becerra incorporates by reference the above-stated general objections as though  
10 fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it poses  
11 a question of pure law. Defendant Becerra is not required to respond to interrogatories raising  
12 questions of pure law. See *AngioScore, Inc. v. TriReme Med., Inc.*, No. 12-cv-03393-YGR (JSC),  
13 2014 WL 7188779, at \*5 (N.D. Cal. Dec. 16, 2014) (“[I]nterrogatories directed to issues of ‘pure  
14 law’—i.e., abstract legal issues not dependent on the facts of the case are not permitted”) (citation  
15 and some internal punctuation omitted). Defendant Becerra also objects to this interrogatory  
16 because it calls for him to interpret what the Legislature intended when it drafted any of the  
17 statutory provisions at issue in this case.

18 Subject to, and without waiving the foregoing objections, Defendant Becerra responds as  
19 follows: Penal Code §§ 26375 and 26405, subdivision (r) do not include definitions of the phrase  
20 “authorized participant.” Thus, what the Legislature intended by that phrase is a question of  
21 statutory interpretation.

22 However, according to the Legislative history of Penal Code § 26375, that section permits  
23 the use of unloaded handguns as an “entertainment props.” (See DOJ 000219) Additionally, the  
24 Entertainment Firearms Permit authorizes the permit holder “to possess firearms loaned to the  
25 permitholder for use solely as a prop in a motion picture, television, video, theatrical, or other  
26 entertainment production or event.” (Penal Code § 29500.) Thus, it is possible to infer that the  
27 Legislature intended the exceptions set forth in Penal Code §§ 26375 and 26405, subdivision (r)  
28 to be available only to those using unloaded firearms loaned to them for use as “entertainment

1 props” in a motion picture, television, video, theatrical, or other entertainment production or  
2 event.

3 **INTERROGATORY NO. 23:** State all facts supporting your response to the preceding  
4 interrogatory.

5 **RESPONSE TO INTERROGATORY NO. 23:**

6 Defendant Becerra incorporates by reference the above-stated general objections as though  
7 fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it poses  
8 a question of pure law. Defendant Becerra is not required to respond to interrogatories raising  
9 questions of pure law. See *AngioScore, Inc. v. TriReme Med., Inc.*, No. 12-cv-03393-YGR (JSC),  
10 2014 WL 7188779, at \*5 (N.D. Cal. Dec. 16, 2014) (“[I]nterrogatories directed to issues of ‘pure  
11 law’—i.e., abstract legal issues not dependent on the facts of the case are not permitted”) (citation  
12 and some internal punctuation omitted). Defendant Becerra also objects to this interrogatory  
13 because it calls for him to interpret what the Legislature intended when it drafted any of the  
14 statutory provisions at issue in this case.

15 Subject to, and without waiving the foregoing objections, Defendant Becerra responds as  
16 follows: Penal Code §§ 26375 and 26405, subdivision (r) do not include definitions of the phrase  
17 “authorized participant.” Thus, what the Legislature intended by that phrase is a question of  
18 statutory interpretation.

19 However, according to the Legislative history of Penal Code § 26375, that section permits  
20 the use of unloaded handguns as an “entertainment props.” (See DOJ 000219) Additionally, the  
21 Entertainment Firearms Permit authorizes the permit holder “to possess firearms loaned to the  
22 permitholder for use solely as a prop in a motion picture, television, video, theatrical, or other  
23 entertainment production or event.” (Penal Code § 29500.) Thus, it is possible to infer that the  
24 Legislature intended the exceptions set forth in Penal Code §§ 26375 and 26405, subdivision (r)  
25 to be available only to those using unloaded firearms loaned to them for use as “entertainment  
26 props” in a motion picture, television, video, theatrical, or other entertainment production or  
27 event.  
28

1 **INTERROGATORY NO. 24:** State all facts supporting your contention that the definition of  
2 “authorized participant” under Penal Code §§ 26375 and 26405(r) refers to a person with an  
3 “entertainment firearms permit” issued pursuant to Penal Code § 29500.

4 **RESPONSE TO INTERROGATORY NO. 24:**

5 Defendant Becerra incorporates by reference the above-stated general objections as though  
6 fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it poses  
7 a question of pure law. Defendant Becerra is not required to respond to interrogatories raising  
8 questions of pure law. See *AngioScore, Inc. v. TriReme Med., Inc.*, No. 12-cv-03393-YGR (JSC),  
9 2014 WL 7188779, at \*5 (N.D. Cal. Dec. 16, 2014) (“[I]nterrogatories directed to issues of ‘pure  
10 law’—i.e., abstract legal issues not dependent on the facts of the case are not permitted”) (citation  
11 and some internal punctuation omitted).

12 Subject to, and without waiving the foregoing objections, Defendant Becerra responds as  
13 follows: Defendant Becerra has not made this contention. What the Legislature intended when it  
14 used the phrase “authorized participant” is a question of statutory interpretation.

15 **INTERROGATORY NO. 25:** Identify all documents bearing upon, supporting, or  
16 reflecting the facts set forth in Your response to the preceding interrogatory.

17 **RESPONSE TO INTERROGATORY NO. 25:**

18 Defendant Becerra incorporates by reference the above-stated general objections as though  
19 fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is  
20 vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to  
21 Plaintiff Zeleny’s claims, and not reasonably calculated to lead to the discovery of information  
22 that is relevant to Plaintiff’s claims.

23 Subject to, and without waiving the foregoing objections, Defendant Becerra responds as  
24 follows: N/A.

25 ///

26 ///

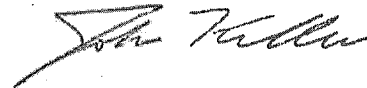
27 ///

28 ///

1  
2 Dated: March 13, 2020

Respectfully submitted,

3 XAVIER BECERRA  
4 Attorney General of California  
5 ANTHONY R. HAKL  
6 Supervising Deputy Attorney General

7 

8 NOREEN P. SKELLY  
9 Deputy Attorney General  
10 JOHN W. KILLEEN  
11 Deputy Attorney General  
12 *Attorneys for Defendant Attorney General*  
13 *Xavier Becerra*  
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**DECLARATION OF SERVICE BY OVERNIGHT COURIER**

Case Name: **Zeleny, Michael v. Edmund G. Brown, et al.**

No.: **3:17-cv-07357 RS (NC)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On March 13, 2020, I served the attached **DEFENDANT ATTORNEY GENERAL XAVIER BECERRA'S RESPONSES TO PLAINTIFF MICHAEL ZELENY'S INTERROGATORIES, SET TWO** by placing a true copy thereof enclosed in a sealed envelope with the **GOLDEN STATE OVERNIGHT COURIER SERVICE**, addressed as follows:

David William Affeld  
Damion D. D. Robinson  
Affeld Grivakes LLP  
2049 Century Park East, Suite 2460  
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Tel: (310) 979-8700  
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Email: [tmaster@hmrmlaw.com](mailto:tmaster@hmrmlaw.com)  
*Attorneys for Defendants City of Menlo Park  
and Dave Bertini*

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 13, 2020, at Sacramento, California.

\_\_\_\_\_  
Tracie L. Campbell

Declarant

\_\_\_\_\_  
*Tracie Campbell*

Signature

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL ZELENY,  
Plaintiff,

v.

EDMUND G. BROWN, et al.,  
Defendants.

Case No. 17-cv-07357-RS

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTION TO  
DISMISS**

**I. INTRODUCTION**

Plaintiff Michael Zeleny brings this action against California Governor Edmund G. Brown, Attorney General Xavier Becerra, the City of Menlo Park, and Commander of the Menlo Park Police Department Dave Bertini, alleging a number of constitutional claims in connection with municipal efforts to prevent him from engaging in protest-related activities involving an unloaded firearm. Governor Brown and Attorney General Becerra move to dismiss for lack of subject matter jurisdiction. For the reasons explained below, the motion is granted with respect to Governor Brown and denied as to Attorney General Becerra.

**II. BACKGROUND<sup>1</sup>**

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<sup>1</sup> The factual background is based on the averments in the complaint, which must be taken as true for purposes of this motion.

Between 2005 and 2012, Zeleny conducted a series of public protests in Menlo Park against WebEx Communications, Inc. and members of its senior management. In an effort to draw attention to his protests, Zeleny began openly carrying and displaying unloaded weapons. This type of display was lawful until the 2012 enactment of California Penal Code section 26350, which made openly carrying an unloaded handgun in public a misdemeanor. In 2013, California adopted similar restrictions on firearms other than handguns, codified as Penal Code section 26400. Penal Code sections 25510, 26375, and 26405 make exceptions, however, for authorized participants in certain scenarios, including entertainment events.

Based on these statutes, the City of Menlo Park adopted a municipal policy requiring a permit for video productions involving firearms. From 2015, Zeleny has repeatedly applied to the city for entertainment permits in connection with his armed protests, but the applications have all been denied without explanation. In addition, the city informed Zeleny that if he engages in his protests without a permit, he will be prosecuted for violations of the above-mentioned statutes. Zeleny seeks, among other things, a judgment declaring sections 26350 and 26400 unconstitutional and an injunction prohibiting the enforcement of these sections against him.

### III. LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1)<sup>2</sup> challenges the court's subject matter jurisdiction over the asserted claims. A jurisdictional challenge under Rule 12(b)(1) may be made either on the face of the pleadings or by presenting extrinsic evidence. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). A district court accepts all

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<sup>2</sup> In their Reply brief, defendants assert for the first time that Claim 5 of the complaint should be dismissed for failure to state a claim under Federal Rule of Procedure 8 because it is "ambiguous, confusing, and improperly pleaded." Reply at 2. Defendants attempt to justify the belated inclusion of 12(b)(6) objections by claiming they were not on notice that Zeleny intended to challenge the constitutionality of California's open carry law until the filing of his opposition. This explanation is unpersuasive, as it is clear from the first sentence of Zeleny's complaint that he seeks to raise such a challenge. Because Zeleny lacked the opportunity to respond, a ruling on defendants' newly raised 12(b)(6) motion will not issue at this time. In any event, although Claim 5 is far from artfully pled, it appears to outline sufficiently the constitutional grounds upon which Zeleny seeks invalidation of California's open carry law.

allegations of fact in the complaint as true and construes them in the light most favorable to the plaintiff. *Id.* at 1140.

#### IV. DISCUSSION

As an initial matter, Zeleny does not oppose dismissal of Governor Brown from this action. Accordingly, the motion to dismiss is granted with respect to Governor Brown.

Attorney General Becerra moves to dismiss the single claim asserted against him on the grounds that the injury Zeleny complains of is not fairly traceable to Becerra. Even if Zeleny could demonstrate standing, Becerra argues, the Eleventh Amendment grants him immunity from suit.

##### A. Standing

To satisfy constitutional standing, “a plaintiff must show (1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 180-81 (2000). As the party seeking to invoke a court’s jurisdiction, plaintiffs bear the burden of establishing constitutional standing by alleging, among other things “a causal connection between [their] injury and the conduct complained of.” *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 134 (2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Here, Becerra challenges Zeleny’s standing based on a purported failure to show causation and redressability. More specifically, Becerra contends that the Attorney General has “no connection” to Zeleny’s potential prosecution by a local prosecutor. To the contrary, where a state Attorney General may assume the role of a district attorney, the Attorney General has a sufficient connection to the enforcement of the state’s criminal laws to be a proper defendant in suits challenging their constitutionality. *Planned Parenthood of Idaho v. Wasden*, 376 F.3d 908, 919–20 (9th Cir. 2004). In California, the Attorney General “has charge, as attorney, of all legal matters in which the state is interested” and may “take full charge of any investigation or prosecution of violations of law,” with “*all the powers of a district attorney.*” Cal. Gov’t Code §§ 12511 & 12550

(emphasis added); *see also Pitts v. County of Kern*, 17 Cal. 4th 340, 357 (1998) (noting that article V, section 13, of the California Constitution gives the Attorney General supervisory authority over all district attorneys, including the power to enforce or assist with the enforcement of California law at his or her discretion). That is, Becerra may in effect be deputized to stand in the role of a county prosecutor, and in that role exercise the same power to enforce state statutes as the county prosecutor would. *See Wasden*, 376 F.3d at 920. That power demonstrates the requisite causal connection for standing purposes. *Id.*; *see also Nichols v. Brown*, 945 F. Supp. 2d 1079, 1106 (C.D. Cal. 2013). Thus, an injunction against the Attorney General could redress Zeleny's alleged injuries, just as an injunction against the county prosecutor could. *See Wasden*, 376 F.3d at 920. Therefore, Zeleny has established sufficient causation and redressability for standing to bring the claim against the Attorney General.

#### **B. Eleventh Amendment Immunity**

The Eleventh Amendment bars actions brought in federal court against an unconsenting state by her own citizens as well as by citizens of another state. *Hans v. Louisiana*, 134 U.S. 1, 9-21 (1890). The Eleventh Amendment also "bars suits which seek damages or injunctive relief against a state, an arm of the state, its instrumentalities, or its agencies." *Franceschi v. Schwartz*, 57 F.3d 828, 831 (9th Cir. 1995) (internal quotation marks omitted). An exception under *Ex Parte Young*, 209 U.S. 123 (1908), however, allows suits against state officers in their official capacities "for prospective declaratory or injunctive relief . . . for their alleged violations of federal law." *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir. 2012). The state official must have *some connection* with the enforcement of the law. *Id.* That connection "must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *Id.* (quoting *L.A. Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir.1992)).

Here, Becerra argues unpersuasively that his connection to the statutes challenged by Zeleny is insufficient for the *Ex Parte Young* exception to apply. As explained above, the California Attorney General not only has "direct supervision over every district attorney," but also

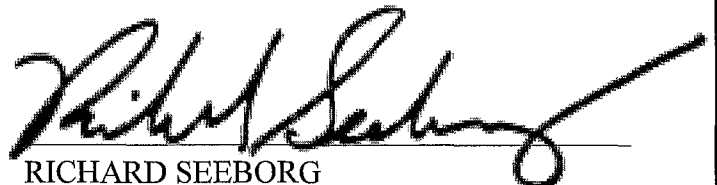
has the duty “to prosecute any violations of law . . . [and] shall have all the powers of a district attorney,” whenever he believes that the law is not being adequately enforced. Cal. Const. art. V, § 13. Because Becerra has the authority to prosecute Zeleny directly for violations of California law, Zeleny has established a sufficient connection between the Attorney General’s enforcement power and the penal statutes at issue in this case to invoke *Ex Parte Young*. See *Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Harris*, 729 F.3d 937, 943–44 (9th Cir. 2013) (finding the Eleventh Amendment did not bar suit against the California Attorney General to enjoin the enforcement of the state’s ban on foie gras). If Becerra had affirmatively declared he will not enforce the statutes in question, he could have challenged Zeleny’s standing based on “an unripe controversy.” *Id.* The Attorney General, however, makes no such challenge. Accordingly, Becerra is not entitled to Eleventh Amendment immunity.<sup>3</sup>

#### V. CONCLUSION

For the foregoing reasons, the motion to dismiss is granted with respect to Governor Brown and denied as to Attorney General Becerra.

**IT IS SO ORDERED.**

Dated: April 17, 2018

  
RICHARD SEEBORG  
United States District Judge

<sup>3</sup> As required for an exception to Eleventh Amendment immunity under *Ex Parte Young*, Zeleny seeks only declaratory and injunctive relief on his claim against Becerra. Zeleny’s prayer for attorney’s fees and costs is ancillary relief and therefore, allowed under *Ex Parte Young*. See *Arizona Students’ Ass’n v. Arizona Bd. of Regents*, 824 F.3d 858, 865 (9th Cir. 2016).

# **EXHIBIT 4**



UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL ZELENY,  
Plaintiff,

v.

GAVIN NEWSOM, et al.,  
Defendants.

Case No. 17-cv-07357-RS (TSH)

**DISCOVERY ORDER**

Re: Dkt. No. 135

Depending on the lawsuit, contention discovery can be important. It is specifically authorized by Federal Rule of Civil Procedure 33(a)(2), which provides that “[a]n interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact . . .” So, in a breach of contract case, it’s not enough to produce the contract and some witnesses who testify about events that happened; if the other side serves an interrogatory asking why you think their conduct breached the contract, you have to tell them. You are not entitled to claim that your legal theories of the case are work product, and then surprise your opponent when you move for summary judgment. Fact discovery includes disclosing your contentions.

Plaintiff Michael Zeleny wants to carry unloaded firearms during his public protests. California generally bans “open carry,” but there is an exception for an “authorized participant in . . . a motion picture, television or video production, or entertainment event[.]” Cal. Penal Code § 26375; *see also id.* § 26405(r). Unhelpfully, there is no statutory definition of an “authorized participant,” nor a provision stating who does the authorizing. There are no governing regulations either. In this case Zeleny seeks a declaration “that California Penal Code §§ 25510, 26375, and 26405 do not require municipal approval of ‘authorized participants’ in an entertainment event or

1 film or video production, and that Zeleny is legally permitted to carry unloaded firearms in  
2 connection with his entertainment events and/or his film or video productions, without the need  
3 for City approval, subject to compliance with other applicable laws . . .” ECF No. 99 (Second  
4 Amended Complaint), prayer for relief B. The California Attorney General (“AG”) denies that  
5 Zeleny is entitled to this declaration. ECF No. 100, prayer for relief B.

6 Zeleny has been trying to take discovery into why the AG contends that Zeleny is not  
7 entitled to carry unloaded firearms in connection with his protests, but the AG won’t tell him.  
8 Zeleny is smart enough to understand that the answer is probably not specific to him, or to people  
9 whose last name begins with “Z,” or to events that happen in Menlo Park as opposed to elsewhere  
10 is California. So, he has phrased his questions at the level of generality at which the answer  
11 presumably is. Still, that does not mean that his interrogatories 10-16 and 22-25 are asking pure  
12 questions of law because they are asking about *his* situation. Interrogatory 10 asks whether an  
13 “authorized participant” means someone authorized by a governmental body or agency because  
14 Zeleny lacks that type of authorization. (It’s an interesting question, by the way. You could read  
15 the statute to mean that the person has to be authorized merely by the organizer of the event.)  
16 Interrogatories 11 and 12 ask what those government bodies or agencies are, and why the AG  
17 thinks that. Interrogatory 13 asks the AG, if Zeleny doesn’t need governmental approval, then  
18 whose approval does he need – because he doesn’t have anyone’s approval other than his own.  
19 Interrogatories 14, 15 and 16 ask for the AG’s contentions with respect to whether the  
20 entertainment event (as opposed to the participant) needs to be authorized – because Zeleny’s  
21 aren’t. And interrogatories 22-25 ask questions about whether someone who has an  
22 “entertainment firearms permit” under Penal Code § 29500 is an authorized participant because  
23 Zeleny doesn’t have one of those permits any more.

24 All of these interrogatories are just asking variants of the same question: *Why do you*  
25 *contend that I am not an authorized participant?* In each rog, he points to something about his  
26 factual situation (no governmental approval, no approval by anyone else, no approval for the  
27 event, no entertainment firearms permit) and asks *is this the reason?* He is not asking pure  
28 questions of law because each interrogatory asks the AG to apply the law to the facts of this case.

1 Zeleny is entitled to learn the answers to his questions sooner than when he reads the AG's  
2 summary judgment motion. The Court overrules the AG's objections and orders him to respond  
3 fully to interrogatories 10-16 and 22-25 within 21 days.

4 **IT IS SO ORDERED.**

5  
6 Dated: September 4, 2020

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8 THOMAS S. HIXSON  
9 United States Magistrate Judge  
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United States District Court  
Northern District of California

### CERTIFICATE OF SERVICE

Case Name: Zeleny, Michael v. Edmund G. Brown, et al. No. 3:17-cv-07357 RS (NC)

I hereby certify that on September 16, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**DECLARATION OF JOHN W. KILLEEN IN SUPPORT OF MOTION FOR RELIEF FROM NONDISPOSITIVE PRETRIAL ORDER OF MAGISTRATE JUDGE**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on September 16, 2020, at Sacramento, California.

Tracie L. Campbell  
Declarant

/s/ Tracie Campbell  
Signature

SA2018100198  
34413318.docx